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Piracy, Slavery, and the Limits of International Law: The Gap Between the Rhetoric and Reality of *Jus Cogens*

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PIRACY, SLAVERY, AND THE LIMITS OF INTERNATIONAL LAW: THE GAP
BETWEEN THE RHETORIC AND REALITY OF *JUS COGENS*

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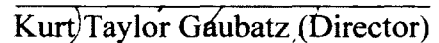
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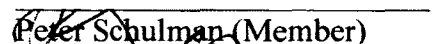
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ABSTRACT

PIRACY, SLAVERY, AND THE LIMITS OF INTERNATIONAL LAW: THE GAP BETWEEN THE RHETORIC AND REALITY OF *JUS COGENS*

Stephanie Elizabeth Smith
Old Dominion University, 2013
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A gap currently exists between the sources of international law in the canon of *jus cogens* or peremptory norms. This gap is observed in the comparison of the rhetoric perpetuated by the community of international lawyers and the actions of states. It is especially apparent in the two oldest tenets of *jus cogens*, the prohibitions against piracy and slavery. The disconnect between rhetoric and reality exposes the limitations and the political nature of international law.

The gap is demonstrated by using peremptory norms as a crucial case in the international legal system because of its perceived status as the strongest and most robust set of norms. However, as demonstrated by the prohibitions against piracy and slavery, they fail to meet expectations. To understand the rhetoric of *jus cogens*, an examination of international legal textbooks is conducted to provide a window into the world view of the community of international lawyers. The other side of the gap is established by both the action and inaction of states concerning these norms. Implications arising from this gap affect the moral basis, purpose, stability, and strength of the international legal system.

The disconnect between the sources of international law gives rise to significant issues in international relations theory. In particular, the epistemic community of international lawyers is seen to have a constructed world view that has power over

agendas and policies. This is shown to be inaccurate based on the crucial case of the peremptory norms surrounding piracy and slavery. International law is considered to be the paragon of normative systems that significantly influence state behavior. However, this project has shown that the mere existence of strong norms within a particular epistemic community may not have extensive power to modify state behavior. Caution is called for when drawing the international legal system as an example of normative power in world politics.

This dissertation is dedicated to those who have inspired me
and to those who are hopefully inspired.

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CHAPTER I

INTRODUCTION

The boat stealthily cut through the water and within moments the gunfire broke out upon the deck of the *Fourseas*.¹ While the majority of the crew was locked in a room, the bridge officers maintained their positions. As the pirates work to retrieve valuables off the heavy cargo ship off the coast of Lagos, Nigeria, gunfire continued until both the ship's captain and chief engineer were dead. In Pakistan, entire families of brick kiln workers live in slavery by making as many bricks as possible to get ahead of the debt that they incur from living at the brick kiln factory.² It takes a family of five to make the minimum of 1,000 bricks needed to get compensation to pay for their debt to live at the brick kiln. These "employers" are willing to extend credit for any life event to tie the individuals tighter to their servitude. If they try to run away, they "are traced by the help of police and local politicians and all the money spent during this exercise is added to their debt."³

When are these two events taking place? Many would guess that it is the eighteenth century or maybe even as recent as the late 1800s, but these events and similar ones occur daily with increasing frequency in the 21st Century. Both incidents are examples of activities that have long been prohibited under international law. These actions are violations of peremptory norms or *jus cogens*, which hold a special place in

¹ The Associated Press, "Violence Against Shippers the New Norm Off West Africa," *USA Today*, February 14, 2012 found at <http://usatoday30.usatoday.com/news/world/story/2012-02-13/nigeria-pirate-attack/53070492/1> retrieved on November 1, 2012.

² Shamsul Islam, "Modern-day Slavery: 'Bounded labour continues at brick kilns'," *The Express Tribune*, November 3, 2012.

³ Islam, 2012.

the international legal system. Why is this important and what are the implications of these illegal acts for the international legal system?

Peremptory norms are specialized and unique areas of international law. These norms, collectively referred to as *jus cogens*, are considered to be very potent. They hold a paramount place in the international legal system. Their perceived nature prohibits derogation from these norms and places apparent obligations upon states to act in support of these norms. *Jus cogens* are also viewed to have the ability to overcome issues of both sovereignty and jurisdiction. While the category of norms that have been designated *jus cogens* is broader than the prohibitions against piracy and slavery, these are the core of the group. These prohibitions are historically more well-established than other areas of *jus cogens*, such as the prohibition of genocide, and provide clear-cut evidence of their status as peremptory norms.

This research project looks at the status of peremptory norms as a window on the current state of the international legal system. To fully understand the condition of this area of the international system, this project will examine the differences between the law in theory and the actual behavior of international actors, specifically with regard to contemporary acts of piracy and slavery. These differences have far reaching implications in the big picture of the international legal system. Examining the inconsistencies between the sources of international law concerning *jus cogens*, specifically the norms prohibiting slavery and piracy will expose a noticeable gap between the rhetoric and the reality of peremptory norms. An understanding of international law is vital to understanding the international system in general because law

“function[s] as a medium of communication and interaction in world politics.”⁴ The intertwined nature of the international legal system and international law, its foundations and tenets, “lie firmly in the development of Western culture and political organization.”⁵ The international legal system is significant component to the overall international system.

The sources of international law are formalized in Article 38 of the *Statute of the International Court of Justice*, which is “widely recognized as the most authoritative and complete statement as to the sources of international law.”⁶ The sources listed in Article 38 are the following: “international conventions, whether general or particular;” “international custom, as evidence of a general practice accepted as law;” “the general principles of law as recognized by civilized nations;” and, “judicial decisions and teachings of the most highly qualified publicists of the various nations.”⁷ While the Statute is not precise about what international custom means, it has come to be understood as “the practice (action or inaction) of States,” relating to “the process whereby custom grows from action by one subject of law which is either accepted, rejected, or tolerated by the other subjects of law.”⁸ Publicists, as referenced in the Statute’s definition of sources, include judges and academic writers on the topic of international law.⁹ Books published by these writers are considered “important as a way of arranging and putting into focus the structure and form of international law and of

⁴ Shirley V. Scott, *International Law in World Politics: An Introduction*, 2nd Ed., (Boulder: Lynne Rienner, 2010), 75.

⁵ Malcolm N. Shaw, *International Law*, 5th Ed., (New York: Cambridge University Press, 2003), 13. See also Scott, 2010, 290.

⁶ Malcolm N. Shaw, *International Law*, 6th Ed., (Cambridge: Cambridge University Press, 2008), 70.

⁷ “Charter of the United Nations and Statute of the International Court of Justice,” October 24, 1945, (New York: United Nations Department of Public Information, 1985), 26.

⁸ Malcolm D. Evans, *International Law*, 3rd Ed. (Oxford: Oxford University Press, 2010), 104.

⁹ Shaw, 2008, 109-113.

elucidating the nature, history and practice of the rules of law.”¹⁰ This study examines the discord between how international law is taught and what is state practice as relating to *jus cogens* or peremptory norms in international law. This engages a conflict between two of the fundamental sources of international law.

The rhetoric of the international legal system, as seen in the teachings of publicists, is that the rules of *jus cogens* are peremptory in nature and thus give rise to more expansive duties and obligations. The reality, as seen in the practice of international actors, is that many acts that violate these basic tenets of international law occur around the world every day. Despite the general acceptance of *jus cogens* as universal and robust by the international community of lawyers, thus not merely aspiration, the significant occurrence of and slavery beyond mere enforcement problems and the willingness of states to avoid their obligations demonstrates that the empirical gap between the reality and the rhetoric regarding *jus cogens* is vast.

DOES INTERNATIONAL LAW MATTER?

International law is important. It has “greatly increased in public prominence,” thus “it has never been more important for all those with an interest in world affairs to come to grips with the workings of the system of international law.”¹¹ International law, as a system, affects not only states, but “increasingly, intergovernmental and nongovernmental organizations, individuals, and other actors in world politics.”¹² The

¹⁰ Shaw, 2008, 113.

¹¹ Scott, 2010, ix.

¹² Scott, 2010, 1.

increased prominence of international law since World War II highlights the importance of this “system of rules, principles, and concepts.”¹³

Some argue that international law is not important or does not provide for an understanding of the international system in general because state behavior trumps the idealistic nature of international law. Most of these arguments revolve around a few main themes that questioned the importance of international law. In other words, why does international law matter? If it does matter for the behavior of states, does international law matter for individuals of the world beyond being merely subjects of states? International law does matter because it provides stability and predictability of the international system, it encourages the modification of behavior of states, and provides an understanding of world relations. The key arguments against the import of international law are addressed below.

International Law is not Law: An Erroneous Tenet

The first argument is the claim that international law is not really law, but merely aspirational thoughts on the international level because it does not mirror most domestic legal systems. This is a common observation about international law in an attempt to dismiss the legal nature of international rules and regulations that fall into the category of international law. There are two main lines of argument to support this contention. Both of these lines of argument revolve around the nature of international law as it compares to features of domestic legal systems.

One common argument about international law is that the rules of international law are not promulgated by a legislature or other law-making body. While this could be

¹³ Scott, 2010, 1.

considered to be true if the only way for law to be created was to have an elected parliament, this discounts the actions of states when they agree to international norms that develop through either treaty or custom. The states act as the promulgating body in their words and deeds. While there is not a set body of legislatures, there is an international community that is comprised of state actors that work together to create a legal framework. Legal frameworks, domestic or international, are based upon the idea and values as expressed through interrelated rules.¹⁴ The different manner in which these rules are created, parliamentary or through state agreement, does not diminish the legal nature of either system.

Another argument that questions the legal nature of international law is that there is no enforcement agency, such as a global police force. The enforcement of international law is also done by the international community of states. This self-enforcing system of a legal framework is based on reputational decisions of states and negative consequences imposed by the rest of the international legal community for failure to comply. International law is a legitimate legal system that is treated as such by both the international communities of states and lawyers. The lack of an independent enforcement agency does not change the view that international law is legitimate because the states do provide enforcement mechanisms in either treaty regimes, reputation on the international political stage, or self-regulation.

State Behavior is all that Matters: A Misguided Argument

The second argument is that it does not matter what states are called upon to do in the international legal system, they are going to do what they want anyway because that

¹⁴ Scott, 2010, 289-292.

is the nature of state behavior. While there are indications that states do accept international law for state interest reasons, it is irrelevant of their motivations. Once a state buys into the system, it can reasonable assumed that states are willing to bind themselves to the tenets of the system as seen in the actions of international actors. Evidence of the willingness of states to follow international law can be seen in everything from states joining the United Nations and participating in various conferences and forums to adhering to rules in the international legal system, such as territorial sea limits. A historical example that highlights the importance of at a bare minimum the appearance of adhering to international law is that “even Hitler pretended that he was acting consistently with Germany’s international obligations at the time of his most terrible violations.”¹⁵

As these arguments are often cited or relied upon by individuals who attempt to minimize the role of international law, to address them in this introduction provides a way for this research project to concentrate on the importance of the gap between sources and the impact this gap has on international law. While some do argue against international law, the importance of the international legal system is seen in the actions of states and individuals. Overall, in the view of governments, which are the subjects, enforcers, and codifiers of international law, hundreds of years of international legal tradition “surely testifies that in their view international law matters.”¹⁶

¹⁵ Louis Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd Ed. (New York: Columbia University Press, 1979), 45.

¹⁶ Henkin, 1979, 39.

Non-Compliance Equals Illegitimacy: A Questionable Premise

This project focuses on the acceptance of international law as a legitimate system, thus an acceptance of the principles and obligations that arise from the system. The international legal system creates obligations upon states. In the case of *jus cogens*, these obligations require that states do more than just passively ignoring the illegal actions that fall into this category. Some see the lack of compliance with international law as evidence that it is not truly law. While not all states comply with international law at all times, this does not eliminate international law as a legitimate legal source. A lack of compliance to a law does not disaffirm the law. Laws are broken all the time, but this does not mean that the law ceases to exist, becomes invalid, or is not law.

While the disregard of legal rules does show a gap between the rhetoric and reality of the international legal system, the legal nature of law is not diminished based upon disobedience of a particular law. For example, the crime of murder or homicide is still illegal in domestic legal systems, despite the fact that some people are still killing others. The fact that individual laws are being broken does not negate the law, it merely shows that there is a need for continued enforcement of the law through the established mechanisms, which domestically is the police force arresting a murderer.

The gap discussed in this project is not an enforcement issue per se as, but is an indication of the enforcement mechanism of state obligations not being fulfilled. States have heightened duties as they relate to peremptory norms according to the nature of this category of international law. Despite these obligations and duties, a high level of piracy and slavery still occur; however, this is not only due to a lack of enforcement. In some

cases, as seen in Chapters IV and V, state officials have colluded with criminals participating in illegal actions or committed these illegal acts.

INTERNATIONAL LAWYERS AND THE *JUS COGENS* GAP

On one side of this gap is the rhetoric created and perpetuated by the community of international lawyers. An epistemic community is “network of professionals” who has “expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within the domain or issue-area.”¹⁷ International lawyers form an epistemic community because they are professionals who work in the domain the international legal system. This community influences and advises on the policy and judgments of states and courts, including the International Court of Justice, through the use of community knowledge.¹⁸ This community’s members are also the publicists in the aforementioned Article 38.

The international legal community’s epistemic viewpoint is a key to understanding the gap between rhetoric and reality. The view of international legal community is that it has “expanded into the sphere of government, resulting in a *penetration pacifique* of ideas from the nongovernmental into official channels.”¹⁹ The rhetoric of the international legal community has “penetrated into official edicts, judgments and conventions.”²⁰ This penetration of ideas and extension of the epistemic community of international legal experts provides the foundational underpinnings for the

¹⁷ Peter M. Haas, “Introduction: Epistemic Communities and International Policy Coordination,” *International Organization* 46, no. 1 (Winter, 1992), 1-35, 3.

¹⁸ Shirley V. Scott, *International Law in World Politics: An Introduction*, 2nd Ed., (Boulder: Lynne Rienner Publishers, 2010), 133.

¹⁹ Oscar Schachter, “The Invisible College of International Lawyers,” *Northwestern University Law Review*, 72, No. 2 (1977), 217-226, 217.

²⁰ Schachter, 1977, 225-226.

development of the international legal system. This community is relatively uniform. Members “function with the same intellectual apparatus” regardless of “whether lawyers are academics in universities, diplomats, legal advisors to foreign offices, judges of the I.C.J. (International Court of Justice) or whatever.”²¹ This shows while they may not be as powerful as internally observed, there is a distinct viewpoint of the community of international lawyers.

The intellectual background of these legal experts is also important due to the overwhelming influence of the Western’s worlds influence on the international legal system. As discussed by Andreas and Nadelmann, “virtually all of the norms that are now identified as essential ingredients of international law and global society have their roots in the jurisprudence... notions and patterns of acceptable behavior established by more powerful Western states.”²² Even “non-European States bowed to Western ‘superiority’ and eventually submitted to the rules elaborated by European countries and the U.S.”²³ The combination of a consistent intellectual framework and the Western background of thought has provided a homogenous epistemic international legal community, as further discussed in Chapter III.

INTERNATIONAL PRACTICE AND THE *JUS COGENS* GAP

The other side of this gap is the general practice of state actors. In terms of the sources of Article 38, this is the international custom as perpetrated by states in the international system. International custom is shown through the general practice of state

²¹ Anthony Carty, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs*, (Dover, NH: Manchester University Press, 1986), 21.

²² Peter Andreas and Ethan Nadelmann, *Policing the Globe: Criminalization and Crime Control in International Relations*, (New York: Oxford University Press, 2006), 20.

²³ Antonio Cassese, *International Law in a Divided World*, (Oxford: Clarendon Press, 1986), 40.

actors in the international legal system. In relation to this project, this will be detailed in Chapters IV and V.

Stability and predictability is provided in the international legal system by the perpetuation of norms and continued action by state actors in support of international legal norms. What does it mean for the international legal system if states are not supporting the most fundamental norms? The lack of action by states to curb violations of *jus cogens* principles is troublesome for the international legal system. The persistence of piracy and slavery in and of itself does not demonstrate the weakness of *jus cogens*; it is demonstrated by the states failing to satisfy their obligations to take action under international law. Insufficient state compliance with these precepts can be seen in negligence by the state, as well as in higher levels of inaction or counteraction, such as state inattention, dereliction, or complicity, as demonstrated in Chapters IV and V. Peremptory norms require positive actions by states. In the case of piracy and slavery, these actions are not occurring and *jus cogens*' obligations are falling short because states are willing to look the other way.

The striking differential between the rhetoric of the international legal community and reality of the international system goes to the heart of a significant problem in international law.

JUS COGENS: A UNIQUE SET OF NORMS

Jus cogens is a crucial case to demonstrate the gap between rhetoric and reality because of its perceived status as a unique set of rules within the international legal system. *Jus cogens* are considered to be a vital component of international law because norms with this designation are viewed to not allow any derogation from and create an

obligation on the part of states to enforce these norms in a universal fashion. *Jus cogens* is a crucial case because it “provide[s] the most definitive type of evidence”²⁴ as compared to supposed lesser norms. Peremptory norms are supposed to be the most robust norms within the international legal system. These norms call upon states and other international actors to fully support them, have the ability to overcome issues of jurisdiction, proscribe behavior by international actors and individuals, provide predictive elements to the international legal system, and have both historical precedents and continuing epistemic to support them. As fundamental norms, these specialized tenets of international law are the extreme examples of tenets within the international legal system. In other words, these norms are considered to be the “*most-likely* case” to be supported by state action, or a crucial case.²⁵ However, as demonstrated by the gap, they are not.

Peremptory norms are not a new phenomenon in relations among states; however, the concept of *jus cogens* has grown in the international legal literature and rhetoric in its meaning and breadth from its beginnings prior to the evolution of the modern day international legal system, as further evidenced in Chapter II. The principle of *jus cogens* has also been expanded from its original codification source, Article 53 of the Vienna Convention on the Law of Treaties (VCLT). According to this treaty:

“a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can only be modified by a subsequent norm of general international law having the same character.”²⁶

²⁴ Alexander George and Andrew Bennett, *Case Study and Theory Development in Social Sciences*, (Cambridge: Belfer Center for Science and International Affairs, 2004), 120.

²⁵ John Gerring, *Social Science Methodology: A Criterial Framework*, (Cambridge: Cambridge University Press, 2001), 220.

²⁶ “Vienna Convention on the Law of Treaties,” May 23, 1969, *United Nations Treaty Series* 1155, 331.

In addition to being an important component of international law, the norms of *jus cogens* are perceived by the international legal community to be both robust and universal obligations. The two most firmly established of these norms are the prohibitions against piracy and slavery. *Jus cogens* provides the guiding principles from which no variance is supported in the international legal system. The fundamental nature is the basis of universality and robustness of *jus cogens* and provides for the obligations that states and other international actors should support in word or deed. If *jus cogens* is elemental in its nature as stipulated in the VCLT, the reality of the support for these principles should be evident in state behavior.

Understanding the concept of *jus cogens* is indispensable to gaining insight into efficacy and stability the international legal system as a whole. This is an area of international law that rhetorically, at least, is considered to be most universal and robust, but is surprisingly neither in practice. Since the community of international lawyers view the concept of *jus cogens* as largely settled, its analysis in the modern era has been less extensive than other areas of international law. The failure of the epistemic community to adequately examine these norms is important because *jus cogens* is considered to be the strongest area of international law. Given that the lawyers are perpetuating the norms through legal argument, writing, and the gap between practice and pedagogy is an obvious obstacle.

The one area of scholarship related to the explication of *jus cogens* the epistemic community focuses on is the consideration of a wider range of substantive issues to be included under this principle. Since peremptory norms provide for obligations on international actors, there is a tendency to want to expand the number of norms that are

considered *jus cogens*. The two oldest norms that fall into this category are the prohibitions of piracy and slavery. Other norms are now accepted in this category, but they do not have the well-established nature of the aforementioned prohibitions. These categories and the related literature are discussed in depth in Chapters II and III.

High level obligations placed upon state actors to adhere to the legal concepts of *jus cogens* and accept the prohibition on derogation makes these legal principles excellent indicators of the state of law in the international legal system concerning peremptory norms. The prohibitions of piracy and slavery do often get into high levels of politics and state interests which can force state interest to override compliance. However, international law is created when there is “necessity and mutual consent.”²⁷ Peremptory norms have been created to deal with the prohibitions of piracy and slavery and can be viewed as being created by this consent and necessity. In addition, it should be noted that “the great majority of the rules of international law are generally observed by all nations without actual compulsion, for it is generally in the interest of all nations concerned to honor their obligations under international law.”²⁸ Given the perceived robust nature of peremptory norms, as seen in Chapter II, and the general observation of international law by states, the gap between the reality and rhetoric in this area is intriguing.

The rhetoric of the international legal community suggests that the concepts and precepts of *jus cogens* are so well-established that they do not have to be examined. The rhetoric of *jus cogens* may be strong and developed, but it has failed to translate into reality that affects behavior in the international community: the gap between the rhetoric of *jus cogens* and the reality of state behavior. The rhetoric that is employed by the

²⁷ Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, 4th Ed. (Alfred A. Knopf, Inc., New York, 1967), 266.

epistemic community posits a deep-rooted support for the existence and obligatory nature of *jus cogens*, yet, a mere skimming of the headlines in the daily press or browsing CNN shows the disconnect between the international legal responsibilities and the actions of state actors.

WHY EXAMINE *JUS COGENS*?

The concept of *jus cogens* is generally viewed as settled in the modern era, therefore the examination of the basis or source of *jus cogens* has not been a typical subject of international legal scholarship. As a result, there is an assumption in the literature that *jus cogens* is supported by international actors, despite a lack of research into its reality. This project will provide an examination of the empirical reality as it relates to the core prohibitions of piracy and slavery.

The international legal system is also explored by international relations theorists in their scholarship because it is an exemplary normative system that is viewed as influencing the behavior of states. However, the consideration of *jus cogens* in international relations has been less extensive than other areas of international law, such as sovereignty and power. The current project intends to address the lack of a scholarly examination of *jus cogens* in international relations literature. While international relations scholarship has expanded in the last few decades to include aspects of socially constructed analysis that shows how “power and state interest are fundamentally formed by ideas and social interaction,”²⁹ there has not been any analysis of the status of *jus*

²⁸ Morgenthau, 1967, 283.

²⁹ Robert Jackson and Georg Sørensen, *Introduction to International Relations: Theories and Approaches*, 3rd Ed., (Oxford: Oxford University Press, 2007), 169.

cogens norms. The disconnect between the rhetoric and reality concerning *jus cogens* exposes the limitations and the political nature of international law.

RHETORIC V. REALITY: WHY IS THIS IMPORTANT?

This is an examination of how the area of international law that is widely expected to be the most robust in practice is falling short of the intentions of the international legal system. Why is *jus cogens* considered to the most robust and strongest area of international law? There are a number of reasons that will briefly be discussed.

Peremptory norms are viewed as not allowing for any derogation, regardless of state of emergency or war. They thus seem to have the ability to override the sovereignty of states by preventing states from entering into contracts or treaties with other states if these agreements will violate *jus cogens*. Other areas of international law do not have the same ability, thus showing the perceived paramount nature of these peremptory norms in the international legal system. The ability of the principles of *jus cogens* to prevent the freedom of contract between state actors contributes to the strength of these peremptory norms.

Furthermore, they are viewed as providing an underlying sense of morality or justice within the international legal system. This apparent underlying ethical framework is used by international actors to not only justify behavior but to provide guidance to the entire system, which is not the goal of the majority of rules. This added seeming value of morality or justice highlights the robustness of *jus cogens* principles as compared to other principles and norms in the international legal system.

Also, these norms have taken on a professed constitutional nature that places them above less superior rules in international law. This can be seen in how these norms

presumably cannot be overridden or modified by any norm that does not have the same peremptory nature. These norms also ostensibly cannot be opted out from through the process of persistent objection, unlike other norms in international law. The supposed constitutional nature of these peremptory norms contributes to the perception that *jus cogens* is the strongest and most robust area of the international legal system.

Finally, these norms profess to confer responsibilities and obligations upon state actors regardless of issues that would normally mitigate such obligations. For example, states have a theoretical responsibility to seek redress for violations of these norms irrespective of where the violation takes place, thus overcoming jurisdictional issues that might prevent recourse for lesser norms. All of these elements show how robust and strong peremptory norms are seen to be in international law.

OVERVIEW OF THE CORE OF *JUS COGENS*

To fully understand this gap, this project details the gap between the rhetoric contained in legal instruction and the reality of state practice through the two different core prohibitions. The first core prohibition is against piracy. Piracy is an important prohibition as it is one area of the international legal system that has been considered illegal for generations. Piracy has been around as long as there has been travel and trade by waterways. Legal measures to support the suppression of piracy have been occurring for centuries and continue today.

While piracy has enjoyed different levels of popularity as a career path, this scourge of the high seas has never truly disappeared. Since the criminal nature of piracy has been a legal concept for centuries, prior even to the naming of *jus cogens*, it can be seen as a truly fundamental principle in international law. As a fundamental principle

that has been championed by legal scholars and state actors alike for centuries, the reality of the increase in piracy, especially over the last several years, underscores the gap between publicists and states. The prohibition against piracy is one of the traditional areas of peremptory norms and the legal aspiration to suppress it has a long history.

While some recent events may show an increase in the willingness of states to participate in anti-piracy measures, overall, the record of states concerning the suppression of piracy is surprisingly poor given the fundamental nature of the prohibition. For example, in 2008, incidents of reported piracy increased by eleven percent worldwide; however, the incidence of piracy is estimated to be two to three times higher than reported.³⁰ The rate of attempted and successful pirate attacks worldwide has nearly doubled from 2008 to 2011.³¹ While the incidence of piracy is increasing around the globe, the response of many governments has not been to follow the tenets of *jus cogens* and to prosecute the individual pirates, but instead it has typically been to pay the pirate ransoms or to release the offenders without prosecution. These concepts are further explored in Chapter IV dedicated to this disconnect between sources of international law concerning piracy.

The second area that demonstrates the *jus cogens* gap between sources is the prohibition against slavery. Slavery is another international phenomenon that has existed for as long as humans have been interacting with each other. A general acquiescence of the practice existed for centuries prior to the modern era of the international system.

³⁰ Daniel Sekulich, "A Look Back at 2008's Piracy Incidents," in *Modern Day Pirate Tales: Notes on the World of Piracy from Journalist Daniel Sekulich* (2009).

³¹ ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Annual Report 1 January – 31 December 2011*, (London: ICC International Maritime Bureau, 2012). See also ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Annual Report 1 January – 31 December 2008*, (London: ICC International Maritime Bureau, 2009).

Slavery has been a hot-button issue since 1788, when international petition campaigns began calling for the end of the practice.³² While many individuals in the world think that slavery has been largely abolished, the reality is much different than what plays through the modern day mind. Not only are there estimates that as many as 2.5 million modern day slaves are new victims each year, but there are probably more slaves today than at any other time in history.³³ While many victims languish in the grips of servitude, the international legal rhetoric on this crime follows the pattern of *jus cogens*. The number of countries that have passed laws against slavery and slave-like practices has continued to rise since the 1800s; however, the reality paints a much different picture, in which governments are not prosecuting these violators. A more detailed examination of this gap and the details of this problem are provided in Chapter V.

TEXTBOOKS: THE WRITTEN RECORD OF THE COMMUNITY

The question when examining epistemic communities is one of how to demonstrate their values and ideals. This project is demonstrating these values and ideals through their perpetuation to the next generation of the community by using educational materials, specifically international legal textbooks. Textbooks are similar to “cultural artifacts” that provide “a core of cultural knowledge which future generations are expected to assimilate and support.”³⁴ This viewpoint also applies to the continuation of the culture and knowledge of the epistemic community of international lawyers as contained in international legal textbooks. By highlighting the aspects of international

³² Ian Clark, *International Legitimacy and World Society*, (New York: Oxford University Press, 2007), 40.

³³ Alexandra Poolos, “Modern Day Slavery on the Rise,” <http://ac360.cnn.com/2009/02/19/modern-day-slavery-on-the-rise/>.

³⁴ Keith Crawford, “The Role and Purpose of Textbooks,” *International Journal of Historical Learning, Teaching and Research* 6, no. 2 (July 2003), 5-10, 5.

legal education that deal with *jus cogens*, insight is gained into how norms in the international legal system are perpetuated among the epistemic community.

The current analysis contained within this project finds the evidence of the perpetuation of norms in international legal textbooks. By a detailed survey of the top textbooks in international law, the current state of international legal education can be ascertained, thus determining the current state of rhetoric. As the architects of the international legal system, the epistemic community of international lawyers is continually passing their beliefs and collective thoughts onto the next generation, consequently perpetuating the rhetoric without regard to the reality beyond a general acknowledgement that international actors do not always follow the rules. This pervasiveness and entrenchment is evidenced throughout international legal textbooks. The faith and belief in the concepts of *jus cogens* as being as fundamental as breathing is evident in the rhetoric provided by international legal textbooks. The abundance of support and consistency in the rhetoric shows that it is not merely “the writer introducing whatever ideas he wishes,”³⁵ but the establishment of a pattern of thought. These basic tenets increase the significance of the gap between the rhetoric and reality of peremptory norms.

Both Louis Henkin and Werner Levi remind us in the late 1970s that there is a difference between the view of lawyers and their textbooks and the diplomat and governments. Henkin specifically examines how diplomats ignore international law in favor of international interests while international lawyers see international law as a

³⁵ Levi, 1976, 144.

respected and growing juridical system.³⁶ Levi claims that there is a difference between textbook law and “living law.” The difference between these two types of law are that “the writer can introduce whatever ideas he wishes,” but “living law is what nations actually practice as they struggle to survive.”³⁷ Under these claims, international lawyers and textbooks can expound upon the concepts within the international legal system without necessarily suffering consequences. While these are providing legitimate points to the difference between textbooks and actions by states, the international legal system “exists ultimately as a body of customary ideas and practices, but these ideas and practices are those of international lawyers as well as statesmen.”³⁸ By viewing the international legal system in its entirety, the importance of understanding the international community of lawyers’ rhetoric, as demonstrated by international law textbooks, is evident.

IMPLICATIONS OF THE *JUS COGENS* GAP

The persistence of piracy and slavery throughout the world beyond problems of mere enforcement by state actors demonstrates the reality of the international system. The robustness of peremptory norms and the related concepts is a central characteristic of the epistemic community’s stance on *jus cogens*. There is a gap between these two positions that raises a number of implications concerning the international legal system and the community of international lawyers. The strong disconnect between the international legal community, who are the architects and perpetrators of the system, and

³⁶ Louis Henkin, *How Nations Behave: Law and Foreign Policy* (New York, NY: Columbia University Press, 1979), 24-27.

³⁷ Werner Levi, *Law and Politics in the International Society*. Vol. 32. (Beverly Hills, CA: Sage Publications, 1976), 144.

the reality, creates the potential for the perceived ineffectiveness and instability in the international legal system. Given the treatment of these two norms and other *jus cogens* in international legal literature, the tendency for state passivity and, in some cases, collusion is a failure to live up to the modern day conceptual framework of *jus cogens*. What does this disconnect mean in the understanding behavior of the international legal community and the international legal system? If the publicists of the system, who perpetuate the continued functioning of the current system through teaching new generations, are operating under different assumptions than reality, what does this say about *jus cogens*?

The international legal system depends upon basic shared and accepted rules to function. Peremptory norms are the crucial case within international law. They are crucial because they are considered to be the most robust and fundamental. The failings of these norms raise concerns about other norms within the international legal system. If *jus cogens* is found to be a mirage, what does this indicate about other aspects of the international legal system, such as universality and sovereignty? If *jus cogens* is so robust and strong it can theoretically overcome the will of states, but it is not living up to its potential, what is the status of lesser principles in the international legal system?

The international legal system is designed to promote a framework for state and individual action. How can it be relied upon for either predictive or proscriptive information if the fundamental principles of the system are not supported by international actors? When the strongest principles of international law are being ignored or even violated by international actors, the ability of the international legal system to provide

³⁸ Terry Nardin, *Law, Morality, and the Relations of States* (Princeton, NJ: Princeton University Press, 1983), 177.

guidance as to the behavior of states and others diminishes. The decrease in the ability of the international legal framework to provide indications as to the reality of peremptory norms creates an effect of diminishing the ability of international actors to rely on the rhetoric of the international legal community, which may have greater consequences than the lack of enforcement of *jus cogens* principles.

An additional implication is based upon the pressure for the continued expansion of *jus cogens* rhetoric. As *jus cogens* rhetoric is expanded in both content and force by the international community of lawyers, what will happen to the fundamental principles that are fulfilling the promise of *jus cogens*? What effect does the lack of reality in these fundamental principles say about the evolution and future of international law and the international legal system generally? Some of the evolving aspects of international law, such as gender issues and environmental protection, are implicated in the lack of support for the current fundamental principles.

The final implication concerns the moral basis of international law. Many view *jus cogens* as a basis for the morality or ethics of the international legal system; however, if the morals/ethics are so far separated from the reality of the international legal system, how does the international system legitimize goals that fall into the category of morality, such as justice and peace? Does this analysis do nothing more than support the proposition that has been argued for years that states merely use norms to legitimize themselves and their nefarious actions or self-interest and not to provide for a higher purpose? Since many in the international community believe that “international law puts a significant brake on the pursuit of...interests”³⁹ by states, thus invoking a possible

³⁹ Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (New York: Oxford University Press, 2005), 15.

morality, the loss of the most robust and conscience-based principles, *jus cogens*, could put this assumption into question.

PREVIEW OF UPCOMING CHAPTERS

This current project is divided into a total of seven chapters. The goal of this chapter has been to provide the general overview of the project, the importance of the project and to dispel some of the common arguments against the scholarly examination of the international legal system and international law for insight into the international arena. Chapter II provides a developmental history of the *jus cogens* concept from its inception to a modern development in the VCLT to the current status of *jus cogens* as an autonomous concept with international obligations placed upon states. This establishment of the theoretical origins and progression of *jus cogens* to the modern day concept is vital for the reader to fully understand the principle status of peremptory norms and the necessity of examining this concept in the international legal system. This examination provides greater understanding of norm formation and establishes the perpetuation that has created this rhetoric/reality gap concerning the most robust and strongest norms in the international legal system, *jus cogens*.

Chapter III examines the rhetoric in international legal education concerning the concept of *jus cogens*. It shows the extent and depth of the perpetuation of a particular rhetorical standpoint regarded these principles. The education that is provided to these future members of the international legal community is the basis of the ideas and thoughts that are used in doctrine and documents. The systematic perpetuation of ideas is demonstrated by an examination of some of the most popular international law textbooks and an evaluation of the rhetorical patterns that develop from these texts. This chapter's

discussion starts with the importance of examining the legal rhetoric as continued through the community of international lawyers through legal conclusions. The chapter then concentrates on the methodology used to choose the textbooks, the criteria used for analysis, and general information about the textbooks used. Next, the chapter explores the results of the detailed analysis of the textbooks by discussing the rhetorical patterns that develop. Finally, a brief summary of what the rhetoric means is provided. This chapter and Chapter II will allow the reader to become well-versed in the rhetoric of *jus cogens*, thus completing the construction of understanding of the first half of the rhetoric/reality gap.

Chapter IV concentrates on the *jus cogens* prohibition on piracy, which “occurs in many parts of the world and although all nations have agreed to discourage and punish it, pirate acts are on the rise with every passing year and at an alarming rate.”⁴⁰ The continued rise in piracy, as seen in the recent actions not only in Somalia, but around the world, indicates that the reality of the *jus cogens* prohibition is found lacking in comparison to the rhetoric of the international legal system. In addition to the rise in piratical acts at a variety of locations, the continued lack of prosecutions, enforcement, and state collusion is discussed.

Chapter V examines at the *jus cogens* prohibition of slavery. Slavery, slave-like practices, and/or human trafficking are a crucial case for this analysis as it is not only one of the oldest prohibitions in the international system, but it “affects virtually every country in the world and is one of the fastest-growing areas of criminal activity.” Given the extent of human trafficking and the well-established understanding that it is

⁴⁰ Jack A. Gottschalk and Brian P. Flanagan, *Jolly Roger with an Uzi: The Rise and Threat of Modern Piracy*, (Annapolis: Naval Institute Press, 2000).

prohibited in international law, slavery is a prime example of the reality of *jus cogens* falling short of expectations provided for by the rhetoric that is perpetuated by the epistemic community of lawyers.

Both examples found in Chapters IV and V are developed in similar fashions. The first section of these chapters deals with the development and history of the prohibition of participating in the international crimes of piracy and slavery. The second section examines the rhetorical patterns that show the rise of these two legal tenets to the current level of *jus cogens* prohibitions and how these are perceived in international legal literature. The third section looks at the current state of affairs concerning piracy and slavery in the international community. The final section looks at the gap between rhetoric surrounding the prohibitions of these international crimes as seen in the rhetorical patterns and the relation to the reality of current affairs.

These two chapters narrow the exploration of *jus cogens* to two specific and vital cases of the rhetoric/reality gap in the international legal system. Each of these chapters provides a brief discourse on the historical development of these prohibitions as *jus cogens* concepts; however, this analysis is not intended to be either a comprehensive study of the complete history of piracy or slavery or to provide an empirical study of these general subjects. Instead, this analysis is provided to demonstrate the reality portion of the rhetoric/reality gap, as indicated by not only the “blind eye” that states turn towards these issues but continues up to the point of over state participation or collusion in these international crimes. Any point along this reality continuum is a violation of *jus cogens* principle and a shirking of state international obligations as detailed at the end of both chapters.

Chapter VI details the implications that develop from the gap between the rhetoric of the international legal system and the reality of the international arena. These implications deal with the stability, basic principles, and morality of the international legal system.

Chapter VII presents the final conclusions of the project. In addition to an overview of the conclusions, this chapter deals briefly with policy questions that arise from the implications examined in Chapter VI. The central policy question is how to actually create a reality more closely aligned to the rhetoric in the international legal system.

The final chapter also looks at areas of future research that would be beneficial in order to expound upon the implications and conclusions of this project. One of the most promising areas of research would be a cross-culture survey of concepts contained in non-Western legal traditions that are historically similar to *jus cogens*. Another area of possible future research would be to examine the interaction between increasing globalization and grass-roots interaction on the rhetoric of *jus cogens* in the international system.

CONCLUSION

The main goal of this project is to provide insight into the nature of the international legal system and the behavior of actors in that system, both states and the international legal community, given that this system has been established and perpetuated to provide predictability of actions and stability of the interaction between international actors. Overall, this is an interesting and important puzzle that has not been examined by the current literature in either international law or international relations.

CHAPTER II

THE HISTORY OF *JUS COGENS*

A review of the source and basis of *jus cogens* is vital to fully understand how peremptory norms have achieved a special place in the lexicon of international law. The putative robustness and strength of *jus cogens* goes directly to why it is a crucial case in international law that can be used to examine the state of the international legal system. This chapter explains the basis of these norms. It does not provide a complete treatise on *jus cogens* development.¹ This review is intended to provide a background of the definitions, concepts and development of peremptory norms in international law. An understanding of the nature and place of *jus cogens* in international law is shown by surveying the history of peremptory norms.

The importance of these norms cannot be underestimated because they demonstrate underlying principles, such as equity and justice that serve as the foundation for the international legal system. This system, like any system of laws, is based upon a convergence of ideas and rules that are tied together with an underlying philosophy.² *Jus cogens* is a fundamental or constitutional concept for the underlying philosophy of the international legal system.

Jus cogens is viewed as more than just a fundamental part of the international legal system in theory. It also has professed practical implications and questions that

¹ This is a brief background due to the number of treatises on the subject that already exist in international legal literature, such as the expansive compilation by Hannikainen that covers the concept from the early 1800s through 1988. Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (Helsinki: Finish Lawyers' Publishing Company, 1988). See also Alexander Orakhelasvili, *Peremptory Norms in International Law* (New York: Oxford University Press, 2006).

arise from the behavior of states concerning these peremptory norms. This concept will be revisited in Chapter VI of this project.

HISTORICAL DEVELOPMENT

The historical development of *jus cogens* as a premier concept in international law can be traced back to the pre-modern era. This section will briefly review the historical background of the development of *jus cogens* prior to its common discussion in the international legal discourse. By providing a brief history of the development of peremptory norms, the impact of these concepts on the international legal system and the rhetoric of the international legal community is demonstrated and provides a basis for the understanding for the information and arguments contained in the following chapters.

Positivism v. Naturalism and the Source of Law

The story of *jus cogens* has been part of the age-old debate between positivists and naturalists in international law. The understanding of the positivism and naturalism debates go to the heart of a number of issues of peremptory norms, including the use of view of *jus cogens* as a fundamental moral baseline for state action and the ability to change the codification of treaties that violate peremptory norms. This debate is seen throughout the conversations concerning *jus cogens* and has greatly influenced the community of international lawyers, especially since World War II.

Positivism is an underlying philosophy of international law that “holds that international law consists only of those rules by which states have consent[ed] to be

² Shirley V. Scott, *International Law in World Politics: An Introduction*, 2nd Ed., (Boulder: Lynne Rienner Publishers, 2010), 75-80.

bound.”³ This consent may be codified in an international treaty or implied by a preponderance of state practice. Positivists profess “a great deal of sanctity accorded to the written text,” because “the treaty is the law,” and “generally express great skepticism about treaties being superseded or altered by anything other than another treaty.”⁴

Naturalism, on the other hand, claims that international law comes from some higher power or overarching reasons of justice or morality.⁵ The dominance of natural law sources for international law was greatly diminished in the nineteenth century, when its counterpoint, positivism became the dominant legal philosophy.⁶ The differences between the positivist tradition and the naturalist tradition dominated the historical development of international law and carried over into the evolution of *jus cogens*.

This project is not purporting to take a theoretical stand on the different schools of thought. The concentration of this analysis is based on the manifestation of rhetoric as demonstrated in the perpetuation of information and knowledge by the epistemic community and the occurrence of instances that fall within the umbrella of *jus cogens*. Even though this project does not follow either school of thought, it is necessary to understand the development of *jus cogens* in light of these two viewpoints.

³ Jack C. Plano and Roy Olton, *The International Relations Dictionary*, 3rd Ed., (Santa Barbara, CA: ABC-Clio, Inc., 1982), 284.

⁴ Anthony Arned Clark, *Legal Rules and International Society*, (New York: Oxford University Press, 1999), 71.

⁵ There are references in literature to naturalists being referred to as “normativists.” For the context of this project, the more customary label of naturalists will be used.

⁶ Benedict Kingsbury, and Adam Roberts, “Introduction: Grotian Thought in International Relations,” 33 in Hedley Bull, Benedict Kingsbury and Adam Roberts (eds.), *Hugo Grotius and International Relations*, (Oxford: Oxford University Press, 1992), 1-64.

First Steps of the Concept – Naturalist Roots

One of the original sources of *jus cogens* is arguably *jus naturale*, which Roman legal scholars referred to as “something which natural reason had established among all men.”⁷ *Jus naturale* was endowed with “the greatest possible authority as law.”⁸ Some scholars also find support for notions of peremptory norms in the “international community of states conforming to 18th century European notions of the international community itself being itself a civil society.”⁹ This civil society was well-established in the European context, but not throughout the rest of the world. Concepts resembling *jus cogens*, while not labeled as such, did “play a significant role in American jurisprudence” to maintain a just result that may not have occurred solely on current legislation since the founding of the United States.¹⁰

World War I was a turning point in the development of the idea of overarching universal norms, which had been generally absent, with the important exception of the prohibitions against piracy and slavery, up until this point.¹¹ One reason for this lack of universality in international law was the underdeveloped nature of the international system. The “community of states” did not fully mature as a recognized concept until after World War I, and thus was unable to provide the necessary conditions for universality to develop. Another reason was a rise in the positivist view on international law. Since international law was becoming dependent upon explicit state consent, the

⁷ P.E. Corbett, *Law and Society in the Relations of States*, (New York: Harcourt Brace and Company, 1951), 4.

⁸ Corbett, 1951, 19.

⁹ Alfred P. Rubin, “*Actio Popularis, Jus Cogens* and Offenses *Erga Omnes*?” *New England Law Review* 35, no. 2 (2001), 265-280, 278.

¹⁰ Karen Parker, “*Jus Cogens*: Compelling the Law of Human Rights,” *Hastings International and Comparative Law Review* 12, no. 2 (1989), 411-463, 456.

rules and restraints on state action that would eventually become *jus cogens* in the modern lexicon had not fully been established. Based on a positivist view of *jus cogens*, “it is understandable that the notions of *jus cogens* and peremptory norms did not have the occasion to come forward as matters of importance within the society of States because there were only a few treaties regarding which it could possibly be alleged that they had infringed norms of an absolute character.”¹²

After World War I, the international community of states became more established as an international legal system. In beginning of the twentieth century, the concept of peremptory norms was introduced without using the term *jus cogens* through the use of analogous theories during the interwar period.¹³ This shift in the legal rhetoric and the increase in the interaction between states, was priming the international legal community for the concept of *jus cogens*.

Introduction to the Rhetoric of Jus Cogens

The concept of *jus cogens* was first introduced into the modern international law lexicon in an article by Verdross in 1937.¹⁴ George Finch also wrote in 1937 about the sources of international law and referring to “obligations of natural law.”¹⁵ These obligations “exist independently of the consent of men” and are considered to be “fundamental principles of international law so universally recognized as to be regarded

¹¹ Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status*, (Helsinki, Finland: Finish Lawyers' Publishing Company, 1988).

¹² Hannikainen, 1988, 112.

¹³ George D. Haimbaugh, Jr., “Jus Cogens: Root & Branch (An Inventory),” *Touro Law Review* 3, no. 2 (1987), 203-227.

¹⁴ Alfred von Verdross, “Forbidden Treaties in International Law,” *American Journal of International Law* 31 (1937), 571-577.

¹⁵ George A. Finch, *The Sources of Modern International Law*, (Washington, D.C.: Carnegie Endowment for International Peace, 1937), 44, 60.

as being based upon the consent of all states,” that “bind the states without their explicit consent.”

The evolution of *jus cogens* began in earnest after World War II and the Nuremberg Trials. The need for a more explicit sense of the fundamental norms in the international system was heightened in the eyes of many after the atrocities of the Nazi regime and others were brought to light. At this point, “the work of natural lawyers and liberal political theorists” that had often been ignored in the international arena, “almost overnight so it seems, became a central and universally accepted part of the established international legal order.”¹⁶

In addition to the call for an international sense of justice, the schism in international law philosophies between the positivists and the naturalists began to shrink after World War II. This shift developed into what has been referred to as the “Grotian tradition,” which is defined as “a tradition that sees international law as a system of law that serves the interests of the international community as a whole and the interests of humanity rather than the narrow interest of state sovereignty.”¹⁷ This tradition, which does not follow a purely positivist or purely naturalist approach, has become increasingly popular since World War I.¹⁸ Nonetheless, the schism remained a point of discussion when the Vienna Convention on the Law of Treaties was negotiated. The central issue was the source of *jus cogens*.

¹⁶ Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics*, (New York: Cambridge University Press, 2002), 125.

¹⁷ John Dugard, “The Future of International Law: A Human Rights Perspective – With Some Comments on the Leiden School of International Law,” *Leiden Journal of International Law*, 20 (2007) 729-739, 738.

¹⁸ Hedley Bull, “The Importance of Grotius in the Study of International Relations,” 79, in Hedley Bull, Benedict Kingsbury and Adam Roberts (eds.), *Hugo Grotius and International Relations*, (Oxford: Oxford University Press, 1992), 65-94.

THE MODERN RULE OF *JUS COGENS*: VIENNA CONVENTION ON THE LAW OF TREATIES (VCLT)

The 1969 Vienna Convention on the Law of Treaties (VCLT) marks the beginning of the modern era of *jus cogens* in the international legal system. This development followed the obvious atrocities perpetrated during World War II when certain fundamental aspects of justice had become “a matter of international concern.”¹⁹ This concern was carried into the negotiations for a number of treaties, including the VCLT.

During the negotiations of the VCLT, the article concerning *jus cogens* “proved to be one of the most controversial and vividly discussed.”²⁰ The debate between the positivists and naturalists again reared its head. One of the manifestations of this debate was an argument about the source of *jus cogens*. Where do these peremptory norms come from in the understanding of international law? As discussed in Chapter I, modern international law sources are typically referenced from Article 38.1 of the Statute of the International Court of Justice. Within Article 38.1, the four main sources of international law are: international conventions; international custom as a general practice accepted as law; general principles recognized by civilized nations; and, judicial decisions and teachings of the most highly qualified jurists.²¹ If *jus cogens* was developed by treaty, such as the VCLT, then how could one treaty be viewed as superior to another treaty? If *jus cogens* is derived from general principles of international law or custom, then how could it be codified to satisfy the positivist perspective in international law? How do

¹⁹ Hennerly Schermers, “Different Aspects of Sovereignty,” 186 in Gerard Kreijen (ed.), *State, Sovereignty, and International Governance*, (New York: Oxford University Press, 2002), 185-192.

²⁰ Jerry Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties: A Critical Appraisal*, (New York: Springer-Verlag/Wein, 1974), 2.

these concepts of peremptory norms, which are viewed as part of morality or equity under the law, be reconciled with the need for positivist support? The debate on the source of *jus cogens* was a primary factor in the negotiations of the VCLT and eventually would influence the continued evolution of *jus cogens*.

The term *jus cogens* was introduced at the negotiations by Gerald Fitzmaurice, an International Law Commission Rapporteur, when he distinguished “between ‘those rules which are mandatory and imperative in any circumstances (*jus cogens*) and those (*jus dispositivum*) which merely furnish a rule for application in the absence of any other agreed regime.”²² G. I. Tunkin, the leading Soviet jurist, viewed these principles as “created” by the will of states, thus “completely distinct from principles of *ordre public* propagated by natural law doctrine which are not dependent upon the wills of states.”²³ This viewpoint allowed for the justification of the natural order by using positivist arguments.

The VCLT provides for the invalidation of treaties that violate the parameters established by *jus cogens*. In Article 53, the VCLT defines a peremptory norm of general international law as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”²⁴ Article 53 also states that “a treaty is void if, at the time of its conclusion, it

²¹ “Charter of the United Nations and Statute of the International Court of Justice,” 1945, *United Nations Treaty Series*.

²² Christopher A. Ford, “Adjudicating *Jus Cogens*,” *Wisconsin International Law Journal* 13, no. 1 (1994-1995), 145-181, 157.

²³ G.I. Tunkin, *Theory of International Law*, Translated by William E. Butler, (Cambridge, MA: Harvard University Press, 1974), 158.

²⁴ “Vienna Convention on the Law of Treaties,” May 23, 1969, *United Nations Treaty Series* 1155, 331.

conflicts with a peremptory norm of general international law.”²⁵ In Article 64 of the VCLT posits that “if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”²⁶

The final pronouncement of the VCLT on *jus cogens* has been seen “as the most significant instance of progressive development in the Convention as a whole.”²⁷ Even those states that “voted against or abstained did admit the existence of *jus cogens* in contemporary international law and disagreed only on issues connected with implementation.”²⁸ Eventually, *jus cogens* took on the character “almost like a kind of sacred cow of international law” that “must be, and is, paid due lip service of true attitudes” because “the uneasiness in raising voice against *jus cogens* was apparent, as if one who would criticize it were running the risk of being declared a grave offender of international legality.”²⁹ The concept of *jus cogens* became more accepted as a method of treaty invalidation, despite the lack of practical application. Thus, while states were considered “competent to make treaties on whatever matter they please,” the “content of the treaty must not conflict with a norm of general international law which has the character of *jus cogens*.”³⁰ A full resolution about the source of *jus cogens* was never fully reached. Whether it flowed from general principles of international law or custom is not specified, but both appear to be accepted as sources of peremptory norms. When this shift began, the debate had centered on questions involving sources of international

²⁵ Vienna Convention on the Law of Treaties.

²⁶ Vienna Convention on the Law of Treaties.

²⁷ Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd Ed., (Dover, NH: Manchester University Press, 1984), 17.

²⁸ Levan Alexidze, “Legal Nature of *Jus Cogens* in Contemporary International Law,” 231 in *Académie de Droit International, Recueil des Cours: Collected Courses of the Hague Academy of International Law*, 3rd ed., (Boston, MA: Martinus Nijhoff Publishers, 1982), 219-270.

²⁹ Sztucki, 1974, 157.

³⁰ Hans Kelsen, *Principles of International Law*, (New York: Rinehart & Company, 1959), 322-323.

law; however, these questions were to be replaced with questions of the content and extent of *jus cogens* in the post-VCLT era.

The Modern Rule of Jus Cogens: Evolution Post-VCLT

The conceptual debate changed significantly after the establishment of *jus cogens* in the VCLT and moved from general acceptance to a more encompassing concept that went beyond mere treaty nullification. *Jus cogens* evolved to being an autonomous concept in international law, beyond the shadow of the VCLT. The VCLT is still the main starting point for any discussion of *jus cogens* in modern international law; however, the tenor of the conversation has fundamentally changed compared to a few decades ago as *jus cogens* has “begun to have a persuasive influence on branches of international law other than the law of treaties.”³¹ These concepts, as they continually evolved, went beyond the previous discussion of the sources of *jus cogens* and are seen as “part of positive law” by commentators.³² In addition to becoming an autonomous concept in international law, *jus cogens* “is now being referenced elsewhere by a variety of actors, not only states, but also NGOs and individuals.”³³ The restrictions, prohibitions, and guidance provided by *jus cogens* are both a limit on the actions of international actors, such as the United Nations Security Council, and a justification for action on the international stage.³⁴

³¹ Sinclair, 1984, 215.

³² Manfred Lachs, *The Development and General Trends of International Law in Our Time*, (Boston, MA: Martinus Nijhoff Publishers, 1984), 204.

³³ Kyoji Kawaski, “International *Jus Cogens* in the Law of State Responsibility,” *In.Law* 10, no. 1 (2007), 6-22, 6.

³⁴ Alexander Orakhelashvili, “The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions,” *The European Journal of International Law* 16, no. 1 (2005), 59-88.

Once the concept of *jus cogens* found a foothold in the rhetoric of international law, the debate began to shift the questions of content, rather than simply existence, outside of treaty law. This movement was one that was “paid scarce attention” by most commentators and jurists at the time of the adoption of the VCLT.³⁵ The concept of peremptory norms has decidedly gone beyond one of dealing specifically and narrowly with treaty law. The conversation has become one of the interaction of *jus cogens* with other international law concepts, content within the *jus cogens* concept, and the enhanced responsibilities and obligations of states.

Jus cogens evolved into a concept that is no longer specifically tied to the narrow discussion of the VCLT. Viewpoints, such as the Rapporteur of the International Law Commission, Sir Humphrey Waldock’s, that “the existence of an international public order containing rules having the character of *ius cogens*” have been gaining strength since in the early 1960s.³⁶ With the end of the Cold War, “the global norm building process” has greatly accelerated in a number of areas, including *jus cogens*.³⁷

There have also been pronouncements by varying judicial bodies that “have endorsed unreservedly the view that *jus cogens* applies outside of the treaty context.”³⁸ One of the most commonly noted cases is the *Military and Paramilitary Activities in and Against Nicaragua*. While the International Court of Justice (ICJ) did use non-*jus cogens* customary law for its decision, the case does show *jus cogens* in a favorable light in the

³⁵ Ian Sinclair, *Hierarchy in International Law: The Human Rights Dimension*, (Antwerpen: Intersentia, 2001), 56.

³⁶ Werner Levi, *Contemporary International Law: A Concise Introduction*, (Boulder, CO: Westview Press, 1979), 36.

³⁷ Edward C. Luck, “Gaps, Commitments, and the Compliance Challenge,” 305 in Edward C. Luck and Michael W. Doyle (eds.), *International Law and Organization: Closing the Compliance Gap*, (Lanham, MD: Rowman and Littlefield Publishers Inc., 2004), 303-330.

³⁸ Sinclair, 2001, 58.

important separate opinions of two judges.³⁹ Another noted judicial body is the International Criminal Tribunal for the former Yugoslavia (ICTY) whose understanding is “that the *jus cogens* character of norms carries direct legal effects *vis-à-vis* the legal character of all official domestic action.”⁴⁰ While some have claimed that this is “a return to natural law from positivism,”⁴¹ it can be seen as a natural progression of the concept of *jus cogens*. To fully understand these more recent developments, the following examination includes the content and expansion issues that have been raised post-VCLT concerning peremptory norms.

The Contested Content of Jus Cogens

The biggest concern about *jus cogens* is the content of the canon of peremptory norms. The basic tenet of *jus cogens* is that the norm must be accepted by the international community as a whole and affect the interests of the world community.⁴² There are four categories of *jus cogens* that have been given support, “the rules protecting the foundations of international order,” “the rule concerning peaceful cooperation in the protection of common interests and the rule protecting the most fundamental and basic human rights,” and “rules for the protection of the civilians in time of war.”⁴³ These norms can be difficult to identify as they are “rules of abstention” that are “prohibitive in substance.”⁴⁴ Despite these difficulties of definition, state intent and the content of *jus*

³⁹ Sinclair, 2001, 60-61.

⁴⁰ Sinclair, 2001, 59.

⁴¹ John Quigley, “Law for a World Community,” *Syracuse Journal of International Law and Commerce* 16, no. 1 (Fall 1989), 1-38, 30.

⁴² Yu Fu, “Review of Chinese Reviews: Selected Article Recently Published in Chinese,” *Chinese Journal of International Law* 6, no. 2 (2007), 515-522.

⁴³ Kamrul Hossain, “The Concept of Jus Cogens and the Obligation Under the U.N. Charter,” *Santa Clara Journal of International Law* 3, (2005): 72-98, 84-85.

⁴⁴ American Branch of the International Law Association, *Report of the Committee on the Formation of Customary Law*, (January 28, 2988), 118.

cogens can still be seen custom and in other methods, such as proclamations and treaties. The most commonly accepted peremptory norms are prohibitions against genocide, piracy, crimes against humanity, slavery and slave-like practices, war crimes, torture, apartheid, and war of aggression.⁴⁵

While the existence of contemporary international law may be impossible without certain principles, such as *pacta sunt servanda*, not all scholars view this as *jus cogens*, but instead as the starting point of international law because it “rests upon and proceeds from this norm.”⁴⁶ Other scholars do view this principle as part of peremptory norms in international law, as the failure to comply with this principle would undermine the function of the entire international legal system.

These debates are important to the understanding of peremptory norms and, as seen below, the expansion of is also highly debated, but these do not change that certain central tenets as well-established. In other words, the debate concerning the content of *jus cogens* does not apply to the core tenets, including the prohibitions against piracy and slavery.

The Expansion of Jus Cogens

Another area of important debate involves the expansion of *jus cogens*. As warned by Weil, the problem of the content of *jus cogens* is still debated to this day. What qualifies as a rule of *jus cogens*? What norms have already reached the status of peremptory norms? This is a trend that “excites” some international lawyers, who are

⁴⁵ Jane E. Stromseth (Ed.), *Accountability for Atrocities: National and International Relations*, (Ardsley, NY: Transnational Publishers, Inc., 2003).

⁴⁶ Tunkin, 1974, 223.

doing their “best to expand and extend” these peremptory norms.⁴⁷ For example, there are other “international crimes” that have not risen to the status of *jus cogens* but may within time, including the theft of nuclear materials, the destruction or theft of national treasures, and bribery of foreign officials.⁴⁸

At what point does an international norm become *jus cogens*? According to Verdross, “the criterion for these rules consists in the fact that they do not exist to satisfy the needs of the individual states but the higher interest of the whole international community.”⁴⁹ One formula to determine if a norm is *jus cogens* requires the satisfaction of two elements, the norm must be of “general international law” and it “has been accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.”⁵⁰ Another formula is to introduce *jus cogens* through “soft law instrumentalities,” which then develop into non-derogable norms through the acceptance of such status by the international community as a whole.⁵¹

It has been suggested that the label of *jus cogens* is applied to legal positions because the label “confers *pathos* on legal arguments that otherwise would appear less convincing.”⁵² This is especially noticeable when “little evidence has been presented to

⁴⁷ Dugard, 2007, 731.

⁴⁸ M. Cherif Bassiouni, “The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities,” 10-11 and 47 n. 92 in Michael N. Schmitt (ed.) *International Law Across the Spectrum of Conflict: Essays in Honour of Professor L.C. Green on the Occasion of His Eightieth Birthday*, (Newport, RI: Naval War College, 2000), 1-56.

⁴⁹ Alfred Verdross, “Jus Dispositivum and Jus Cogens in International Law,” *The American Journal of International Law*, 60, No. 1 (Jan. 1966), 55-63, 58.

⁵⁰ Christos L. Rozakis, *The Concept of Jus Cogens in the Law of Treaties* (New York: North-Holland Publishing Company, 1976, 45.

⁵¹ Christine Chinkin, “Normative Development in the International Legal System,” 40 in Dinah Shelton (Ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, (New York: Oxford University Press, 2000), 21-42.

⁵² Ulf Linderfalk, “The Effect of *Jus Cogens* Norms: Whoever Opened Pandora’s Box, Did You Ever Think About the Consequences?” *The European Journal of International Law* 18, no. 5 (2008), 853-871, 855.

demonstrate how and why the preferred norm has become *jus cogens*.”⁵³ Another possible reason a norm is claimed to be peremptory is to “override the will of persistent objectors to the emergence of the norm as customary international law.”⁵⁴

The legitimacy of expanded of *jus cogens* is questioned by Anthony D’Amato when he discusses how any writer is enabled to “christen any ordinary norm of his or her choice as a new *jus cogens* norm, thereby in one stroke investing it with magical power.”⁵⁵ While D’Amato is taking the argument to an extreme to prove his point, he does legitimately raise the concern about the continuous expansion of this category. This continued expansion could weaken the robustness of the category of peremptory norms, as discussed further in Chapter VII.

While this is important for the understanding of the cannon of peremptory norms, these issues do not apply to the well-established core tenets that are the focus of this study, the prohibitions of piracy and slavery.

THE HIERARCHY AND RESPONSIBILITY OF *JUS COGENS*

The key provisions of peremptory norms are its hierarchical provisions and the responsibilities and obligations that emanate from the nature of these norms. These provisions also add to the uniqueness of *jus cogens* in the international legal system. This is particularly evident in the prohibitions against piracy and slavery.

⁵³ Dinah Shelton, “Normative Hierarchy in International Law,” *The American Journal of International Law* 100, no. 2 (April 2006), 291-323, 303.

⁵⁴ Shelton, 2006, 304.

⁵⁵ Anthony D’Amato, “It’s a Bird, It’s a Plane, It’s Jus Cogens!” *Connecticut Journal of International Law* 6, no. 1 (1991).

The Hierarchy of Legal Norms

How does *jus cogens* interact with other norms and aspects of international law? This has led to an understanding of a hierarchy of norms with *jus cogens* as the pinnacle. Peremptory norms are “generally expected to be supreme, and that is how they operate if they are effective.”⁵⁶ The label of *jus cogens* allows for “a principle whose perceived importance, based on certain values and interests, rises to a level which is acknowledged to be superior, and thus capable of overriding another norm, rule, or principle.”⁵⁷ This superior nature and ability to override another norm or principle clearly indicates that *jus cogens* is at the top of the hierarchy of international law. Despite the existence of the hierarchy in international law, there is a question of the practical ability of *jus cogens* “to sweep away lower ranking rules of international law.”⁵⁸

According to the well-known positivist Prosper Weil, the creation of hierarchy “is one doomed to flabbiness, one that in the end will be reduced to a convenient term of art, covering a great variety of realities difficult to grasp.”⁵⁹ His main disappointment appears to be less one of not agreeing with the existence of a hierarchy, but more questioning what will fall into this hierarchy and its lack of specificity. Weil warns that “to succumb to the heady enticements of oversubtlety and loose thinking is to risk launching the normative system of international law on an inexorable drift towards the

⁵⁶ Jordan Paust, “The Reality of *Jus Cogens*,” *Connecticut Journal of International Law* 7, no. 1 (1991), 81-85, 84.

⁵⁷ M. Cherif Bassiouni, “A Functional Approach to ‘General Principles of International Law’,” *Michigan Journal of International Law* 11, no. 3 (Spring 1990), 768-818, 805.

⁵⁸ Andrea Bianchi, “Human Rights and the Magic of *Jus Cogens*,” *The European Journal of International Law* 19, no. 3 (2008), 491-508, 501.

⁵⁹ Arend, 1999, 72.

relative and random.”⁶⁰ While there is a disagreement among some about the establishment of the hierarchy of norms that has developed with *jus cogens* at the pinnacle, the majority of scholars and jurists do follow the logical conclusion that if a norm is peremptory, then it must be stronger and more robust than norms of a lesser category.

Responsibilities Flowing from Jus Cogens

Beyond the discussions of scope/content, expansion possibilities, the impact upon other norms, and the hierarchy of law, the current status of *jus cogens* provides for states to fulfill obligations *erga omnes* that develop from these peremptory norms. These obligations require “the enforcement of the positive law prohibiting the violation of a *jus cogens* right, i.e. the redress of any such violation falls within the competency of each and every state comprising that community.”⁶¹ These obligations were reinforced by the ICJ in the *Barcelona Traction* case that distinguished between “the responsibilities of the state *vis-à-vis* another state (diplomatic protection) and the responsibilities of a state *vis-à-vis* the international community as a whole (prohibition of aggression and genocide; protection of human rights)” which “the latter are in the interest of all states.”⁶² These obligations are a critical and distinctive element of peremptory norms.

In the cases where the peremptory norm in question is an international criminal law, states have been charged with enhanced responsibility. This enhanced responsibility is based on the notion that “states should not only have the right but the duty to demand

⁶⁰ Prosper Weil, “Towards Relative Normativity in International Law?” *The American Journal of International Law* 77, no. 3 (July 1983), 413-442, 440-441.

⁶¹ Sinclair, 2001, 106.

⁶² H.A. Strydom, “*Jus Cogens*: Peremptory Norm or Totalitarian Instrument?” *South African Yearbook of International Law* 14, (1988-1989), 42-58, 46.

observation” of peremptory norms “and, within the limits of the law, see to their enforcement.”⁶³ In addition to the duty to see to their enforcement, “each state should have jurisdiction to prosecute those who commit such a crime.”⁶⁴ Once an action has been designated as being prohibited by *jus cogens*, states must not “grant impunity to the violators of such crimes,” regardless of “where they were committed, by whom (including Heads of State), against what category of victims, and irrespective of the context of their occurrence (peace or war).”⁶⁵

From these duties, flow issues of jurisdiction. Universal jurisdiction is claimed to apply to international crimes that fall into the category of *jus cogens*. Universal jurisdiction allows for “any state to exercise jurisdiction over” violations of peremptory norms, “wherever they take place and whatever the nationality of the alleged offender or victim.”⁶⁶ In some circumstances, the duty has surpassed the mere application of universal jurisdiction. Some judicial bodies, such as the Supreme Court of Mexico, have concluded that “a domestic amnesty granted as regards a *jus cogens* crime cannot affect the jurisdiction of a third state.”⁶⁷ Despite this support for universal jurisdiction and the duty to prosecute, the recognition that universal jurisdiction mandates prosecution is still unsettled because it appears to have not been accepted by the international community as

⁶³ Werner, 1979, 239.

⁶⁴ Sinclair, 2001, 106.

⁶⁵ M. Cherif Bassiouni, “International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*,” *Law and Contemporary Problems* 59, no. 4 (Autumn 1996), 63-74, 65-66.

⁶⁶ Anthony Aust, *Handbook of International Law*, 2nd Ed. (New York: Cambridge University Press, 2010), 44.

⁶⁷ Leila Nadya Sedat, “The Effect of Amnesties before Domestic and International Tribunals: Morality, Law and Politics,” 233 in Edel Hughes, William A. Scabas and Ramesh Thakur (eds.), *Atrocities and International Accountability: Beyond Transnational Justice*, (New York: United Nations University Press, 2007), 225-245.

a whole.⁶⁸ While it may not be seen by a minority as completely settled, the general trend combined with the robust nature of *jus cogens* implies a duty to prosecute and universal jurisdiction to fulfill such a duty.

THE UNIQUE STRENGTH OF *JUS COGENS* NORMS

The strength of *jus cogens* comes from more than just the declaration that these norms are fundamental. It also comes from the responsibilities and obligations that appear to flow from the modern concept of *jus cogens*. The concept of peremptory norms, which allow no derogation, is considered hierarchically superior to the other concepts in the international legal system, as will be examined in greater detail below. These two features of *jus cogens* create a perception that these norms are the strongest and most robust principles in international law with the ability to both overcome sovereignty and require states to perform duties.

According to the international legal community, one of the main strengths of *jus cogens* is its ability to provide restraint on the unfettered sovereignty of states. This is now presented as a “legal reality.”⁶⁹ These peremptory norms limit sovereignty and confirm “the cosmopolitan character of the global legal system.”⁷⁰ In other words, “modern international law can no longer be regarded as giving the protection of State

⁶⁸ Michael P. Scharf, “Trading Justice for Peace: The Contemporary Law and Policy Debate,” in Edel Hughes, William A. Scahbas and Ramesh Thakur (eds.), *Atrocities and International Accountability: Beyond Transnational Justice*, (New York: United Nations University Press, 2007), 246-274.

⁶⁹ Yasuhiko Saito, “International Law as a Law of the World Community: World Law as Reality and Methodology,” in *Joint UNITAR – Uppsala University Seminar of International Law and Organization* (1983), 233-249.

⁷⁰ Jean L. Cohen, “Whose Sovereignty? Empire Versus International Law,” *Ethics & International Affairs* 18, no. 3 (2004), 1-24, 9.

sovereignty absolute primacy over the protection of life.”⁷¹ By limiting sovereignty, the hierarchical superior position of *jus cogens* is secured in the international legal system.

Another strength of *jus cogens* is its acceptance by nearly the entirety of the international legal community. While there are some debates and questions concerning expanding the content and practical applicability of peremptory norms, the overall concept has been fully accepted and is used by members of the international legal community to call for action against perpetrators who flaunt the prohibitions contained within the label. In particular, the prohibition of piracy and slavery, which are the focus of this research project, are not questioned. Simply stated, *jus cogens* is viewed as the strongest and most robust portion of international law. And within *jus cogens*, the prohibition against piracy and slavery are the oldest and most entrenched of these norms within the international legal system.

ANTI-JUS COGENS VIEWPOINTS

While the overwhelming majority of scholars view the concept of *jus cogens* as well-established, a minority of strict positivists exist that need to be addressed. These individuals still consider *jus cogens* as useful only when invalidating a treaty and do not believe that they have achieved a separate status legitimacy beyond the VCLT. These viewpoints, while in the extreme minority, do add to the greater understanding of both consistency of jurisprudence involving peremptory norms and of the shift to prodigious acceptance in the international legal system of *jus cogens*.

⁷¹ Christopher Greenwood, “International Law and the Conduct of Military Operations: Stocktaking at the Start of the New Millennium,” 186-187 in Michael N. Schmitt (ed.) *International Law Across the Spectrum of Conflict: Essays in Honour of Professor L.C. Green on the Occasion of His Eightieth Birthday*, (Newport, RI: Naval War College, 2000), 179-202.

The denial of an autonomous concept of *jus cogens* creates two main outcomes. The first is that *jus cogens* is an issue if and only if two or more states enter into a treaty that explicitly allows the prohibited norm. In the view of John Rogers, “if the conduct is truly reprehensible, and widely considered reprehensible, it is unlikely that states will enter such treaties,” thus rendering peremptory norms “not particularly significant.”⁷² This may be a valid point for strict positivists in the modern era. It is worth noting, however, that historically states regularly entered into treaties to condone slavery and other prohibited actions.

The second outcome is that the traditional peremptory norms thought to be universal, such as the prohibitions against piracy and slave trading, “are not necessarily violations of public international law at all,” but merely actions that allow for prosecution because jurisdictional issues have not been violated.⁷³ In other words, it is not universal jurisdiction flows from the fact that these are peremptory norms, but they fall into other possible categories of jurisdiction. By viewing peremptory norms in such a fashion, there is a basic denial of the development and acceptance of these norms in the international legal system. The underlying purpose of *jus cogens* is not mere treaty nullification, but has risen to be a source of international law from which no derogation is permitted from in either words or deeds, as demonstrated throughout this project.

In addition to these two outcomes, there are a few scholars and jurists who argue that *jus cogens* is nothing more than “arguments of public order” used “to avoid

⁷² John M. Rogers, *International Law and United States Law*, (Brookfield, VT: Ashgate Publishing, Ltd., 1999), 16-17.

⁷³ Rogers, 1999, 117.

disrupting existing power arrangements.”⁷⁴ In other words, state actors use *jus cogens* for blatant self-interest or to maintain the status quo as it is benefiting them. It is viewed by some that “states rarely take to heart the fulfillment of international obligations when none of their direct interests [are] involved.”⁷⁵ This is an argument that is also applied to international law generally. This perspective does not take into account the lip-service provided by states, especially concerning the prohibitions against piracy and slavery. The jurists who fall into this category are in the minority as demonstrated in Chapter III.

The final criticism of *jus cogens* that is commonly discussed is the lack of significant case law from the ICJ and other international judicial bodies. In addition to the limited number of cases addressing *jus cogens*, in some readings of these cases where it has, the ICJ “seems generally to demonstrate a very cautious approach towards the concept.”⁷⁶ These criticisms concentrate on the expansion of *jus cogens* into areas of law that are not historically considered peremptory. This is an important criticism that is worthy of further consideration, but does not impact the conception of *jus cogens* used in this project because of the concentration on the core content of *jus cogens*, the prohibitions against slavery and piracy which is much less vulnerable to this critique. While the ICJ has not pronounced on this particular subject as often as some scholars might prefer, it has been accepted in the rhetoric of the international legal system as discussed throughout this chapter and in the following chapters.

⁷⁴ Gordon A. Christenson, “*Jus Cogens*: Guarding Interests Fundamental to International Society,” *Virginia Journal of International Law* 28, (1987-1988), 587-648, 639-640.

⁷⁵ Giorgio Gaja, “*Jus Cogens: Beyond the Vienna Convention*,” 290 found in *Académie de Droit International, Recueil des Cours: Collected Courses of the Hague Academy of International Law*, 3rd ed., (Boston, MA: Martinus Nijhoff Publishers, 1982), 271-316.

⁷⁶ Jacob Werksman and Ruth Khalastchi, “Nuclear Weapons and *Jus Cogens*: Peremptory Norms and Justice Pre-empted?” 182-182 in Laurence Boisson De Chazournes and Philippe Sands, (eds.) *International Law, The International Court of Justice and Nuclear Weapons*, (New York: Cambridge University Press, 1999), 181-198.

The Special Status of the Prohibitions Against Piracy and Slavery

While the development of “truly universal norms” that could be considered *jus cogens* did not mature prior to World War I, there were some areas that developed enough to give rise to some international obligations.⁷⁷ In particular, two areas of the law that had grown to the point of possibly being considered universal or peremptory were the prohibitions against piracy and slavery, which are the focus of this study, and the acceptance of the freedom of the high seas. Evidence of these prohibitions can be seen throughout international legal history prior to the shift of the *jus cogens* post World War I. Regardless of the debates about the content and expansion of *jus cogens*, the peremptory nature of the norms concerning the prohibitions against piracy and slavery are currently not debated. These prohibitions are the longest standing and most well-established prohibitions as seen in the discussions of these cases in Chapters IV and V.

CONCLUSION

Despite some controversies around the edges, peremptory norms are considered in international law to be both robust and strong. The norms had their beginnings in legal concepts going back as far as the Roman Empire and are continuing to evolve today. This evolution, which was formalized in the VCLT, has been overwrought with issues of the classical debate between the positivists and the naturalists. Despite this ongoing discussion of sources of international law, the concept of peremptory norms “finds reception and recognition in all the principal legal systems of the world.”⁷⁸ These peremptory norms have become an autonomous concept, which has far reaching

consequences in the rhetoric and expectations of the international legal system, most importantly universal jurisdiction and duties to enforce these tenets. This is the primary concentration of the literature in the field of peremptory norms, thus demonstrating that the general concept of *jus cogens* has been fully accepted. The lack of a well-established content does raise questions as to the breadth of peremptory norms, the expansion of the category of norms, and what will be the long-term consequences, as seen in chapter seven. However, the basic concept and its approach to the prohibitions against piracy and slavery are now essentially taken for granted.

According to Rozakis, the introduction of *jus cogens* has created “a remarkable step forward towards a more disciplined legal order” that “entered the scene of international legal relations exactly at the time that the need of such protection is urgently felt.”⁷⁹ The protections that are provided by these norms are rhetorically significant in that they provide the ability of the international legal system to protect individuals and to overcome the presumption of sovereignty that has in the past created violations of human rights and international criminal law.

These norms also create an underlying sense of justice within the international legal system by providing for “certain greater values” above the traditional value of power in the international legal system.⁸⁰ This “moral order in international relations” has been generally accepted and can be seen as justification for “rules seeking to prevent

⁷⁷ Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status*, (Helsinki, Finland: Finnish Lawyers' Publishing Company, 1988), 28, 37.

⁷⁸ Alexidze, 1982, 235.

⁷⁹ Rozakis, 1976, 194, 193.

⁸⁰ Stefanie Schmahl, “An Example of *Jus Cogens*: The Status of Prisoners of War,” 56 in Christian Tomuschat and Jean-Marc Thouvenin (eds.), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes*, (Leiden, The Netherlands, Martinus Nijhoff Publishers, 2006), 41-68.

conduct *contra bonos mores*.”⁸¹ The importance of this introduction of a moral order should neither be overstated nor underestimated. The rhetoric provides an outlet for behavior or condemnation that would otherwise not necessarily be supported prior to the full development of *jus cogens*. Questions that flow from this acceptance of the underlying ethical system contained within the international legal system, such as the legitimization of evolving goals, will be further detailed later within this project.

While the concept of *jus cogens* is robust and strong in the international legal system, there are questions surrounding the full implications of the gap between the reality of the international legal system and the rhetoric provided by the international legal community. The concept of *jus cogens* has become a fundamental pillar in the international legal system and the lack of realistic support within the international political system shows the potential fragility of a legal system. As the following chapters will demonstrate, the rhetoric surrounding peremptory norms is uniform and generally accepted by the international legal community.

In the next chapter, the perpetuation of the rhetoric of *jus cogens* as seen in the legal textbooks that are used to teach the next generations of the international legal community will be demonstrated. Textbooks provide a written record of the international community of lawyers. Understanding the perpetuation of the ideals and values of this community through these textbooks will demonstrate one of the sources of Article 38, the teachings of publicists. This written record will show the viewpoints of the community of international lawyers, thus giving insight beyond the theory presented in this chapter.

⁸¹ Władysław Czapliński, “*Ius Cogens* and the Law of Treaties,” 97 and 83 in Christian Tomuschat and Jean-Marc Thouvenin (eds.), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes*, (Leiden, The Netherlands, Martinus Nijhoff Publishers, 2006), 83-98.

CHAPTER III

TEXTBOOKS AND RHETORIC

Jus cogens is a part of international law where a discontinuity of sources as found in Article 38 of the *Statute of the International Court of Justice* exists. This disconnect is found in the difference between the rhetoric of the community of international lawyers and the reality as perpetrated by state actors.

This chapter intends to provide a perspective on the ideals of the international legal community concerning *jus cogens* through an empirical examination of legal textbooks. By examining this rhetoric, a greater understanding of the international legal community's knowledge and ideals is possible. These ideals and knowledge, as seen in Chapter I, are one of the sources of international law under Article 38. Specifically, the ideals and knowledge of the international legal community are evidenced in the "judicial decisions and teachings of the most highly qualified publicists of the various nations."¹

This chapter provides further explanation of the importance of the epistemic community of international lawyers and how it relates to this project. The community's written record, textbooks, is analyzed to show the rhetoric of peremptory norms. The rhetoric contained within these books indicates one side of the rhetoric/reality gap.

THE EPISTEMIC COMMUNITY OF INTERNATIONAL LAWYERS

The epistemic community of international lawyers is composed of individuals who are a "network of professionals" who have "expertise and competence" in the issue

¹ "Charter of the United Nations and Statute of the International Court of Justice," October 24, 1945, (New York: United Nations Department of Public Information, 1985), 26.

area of international law.² The community is bound together by “their shared belief or faith in the verity and applicability of particular forms of knowledge or specific truths.”³ In the case of the community of the international lawyers, this is evidenced by the continuity and near unanimous understanding parts of the international legal system, specifically peremptory norms. As the ideals and values are “transmitted from one party to another” the influence of epistemic communities in “institutionaliz[ed].”⁴ The members of this community influence and advise the policy and judgments of states and courts, including the International Court of Justice. The examination of the transfer of knowledge and its resulting influence concerning peremptory norms in the international legal system by the epistemic community generates new understanding.

Epistemic communities also “help frame and structure collective understanding and action” creating “the most meaningful notion of learning in international relations.”⁵ In terms of *jus cogens*, the different rhetorical themes used by the community of international lawyers provides both a general understanding of peremptory norms and their development in the international legal system. This collective understanding is composed of the ideals and values of the epistemic community. These ideals and values are manifested as one of the sources of international law under Article 38 contained in international legal textbook, as detailed below.

² Haas, 1992, 3.

³ Haas, 1992, 3, footnote 4.

⁴ Emanuel Adler and Peter M. Haas, “Conclusion: Epistemic Communities, World Order, and the Creation of a Reflective Research Program,” *International Organization*, Vol. 46, No. 1, Knowledge, Power, and International Policy Coordination (Winter 1992), 367-390, 374.

⁵ Adler and Haas, 1992, 385.

WHY TEXTBOOKS?

Textbooks are the written record of the formal instruction of the epistemic community of lawyers. The rhetoric of this group can be determined as it is being transmitted to the next generation of members through textbooks and teaching by examining textbooks. The community writes the textbooks and interprets the documentation, including scholarly writing, texts, and cases. Using textbooks as the basis of this study provides direct evidence of the values and norms of the community and indicates what the community thinks is important enough to be perpetuated.

While there is a factor of on-the-job training that takes place, these newly-minted members are taught by individuals who are already part of the established epistemic community. This process perpetuates the ideals and values of the current community. An examination of the method of indoctrination into the community is necessary to fully understand the basis of the international legal community. This can be accomplished by examining the legal education that lawyers receive, in particular, through the written record found in legal textbooks.

A comprehensive analysis of international law textbooks has not been performed, thus there is a need for this analysis to fully understand how the perpetuation of concepts and ideas within the international community of lawyers occurs. This study concentrates on textbooks to establish how knowledge is transferred throughout the community.

While non-textbook sources, such as treaties and cases, are used in this study to provide the legal and historical basis for some of the concepts, the purpose of this study is to look at the difference between the rhetoric as demonstrated by the perpetuation of knowledge through educational materials of the epistemic community and the reality of the

international legal system. This concentration provides a big-picture look that has not be previously provided within the current scholarship.

In addition to being a novel method of examining the international legal system, using textbooks instead of sources, the purity of the rhetoric of the epistemic community is preserved without the overlay of interpretation. In other words, textbooks provide an unfiltered look at the norms and ideas of the community. The importance of understanding the norms and ideas of this community is necessary as these are the individuals influencing policy, laws, treaties and other instruments, while providing the foundation of the international legal system through their rhetoric.

Western Concentration

This study concentrates on Western viewpoints, teachings, and sources due to the natural bias created by the Western domination of Western practitioners and scholars in this field. As noted by Gaubatz and MacArthur in a 2001 study on the internationality of international law, “the practice of international law remains the province of a handful of Western states.”⁶ In addition to the empirical evidence provided by this study as to the Western bias of international law, the bias is also evidenced in viewpoint expressed by Andreas and Nadelmann. These authors state that “virtually all of the norms that are now identified as essential ingredients of international law and global society have their roots in the jurisprudence of European scholars of international law and in the notions and themes of acceptable behavior established by the more powerful Western European

⁶ Kurt Taylor Gaubatz and Matthew MacArthur, “How International is ‘International’ Law?” *Michigan Journal of International Law*, 22, no. 2 (Winter 2001), 239-282, 278.

states.”⁷ Given that this appears to be the prevailing viewpoint of most practitioners and scholars in the field of international law based upon my research, the concentration on English language textbooks is a necessary limitation on the expanse of this portion of this project.

METHODOLOGY

The following discusses the method of textbook selection and the criteria used to analyze the textbooks to determine the epistemic community’s rhetoric on *jus cogens*. These textbooks are used to look at the overall rhetoric of peremptory norms. The following chapters present the rhetoric contained in these books as it relates specifically to the two examples of *jus cogens*, the prohibitions against piracy and slavery.

Textbook Selection

The textbooks were selected based upon popularity on Internet book purchasing sites. Internet sales have continued to grow and is becoming a dominate force in the sale of textbooks. According to some industry measures, the total growth of online book sales is over sixty-eight percent in the last few years.⁸ In addition to becoming an increasingly prevalent method of obtaining books, internet bookselling outlets provide matrices that measure the popularity of individual books. Since this study is examining the perpetuation of knowledge, the greater the distribution of the resource that is used to provide this knowledge, the more pervasive the viewpoint contained within this resource

⁷ Peter Andreas and Ethan Nadelmann, *Policing the Globe: Criminalization and Crime Control in International Relations* (New York, NY: Oxford University Press, 2006), 20.

⁸ Association of American Publishers, “Online Retail,” found at www.publishers.com.

through the community. In order to narrow the scope of this study, the most popular textbooks are used to indicate the rhetoric of the epistemic community.

A search for the top eleven sites for book purchasing based on a Google search for keywords “law textbooks” was conducted. A search of these sites was concentrated on either “general international law” or “public international law” as the subject –matter. The top fifty listed were chosen to form a list of the top textbooks from each site.⁹ Any textbook that appeared on a minimum of four sites was added to the final list. Books published more than fifteen years ago were excluded and, if necessary, used as supporting material in other sections of this project. The majority of these texts published within the last ten years, with some within the last year.¹⁰ In some cases, the last two editions were used to show the continuity of the knowledge contained within these texts. However, a number of these texts only have a single edition. These textbooks provide sufficient evidence of the teaching rhetoric used by the epistemic community of lawyers.

Analysis Criteria

The analysis of the textbooks is based on the preponderance of discussion, the different case law references, the support of the individual concepts of *jus cogens* and the overall tenor of the information that is provided to the student. Each textbook was examined to determine if there was any discussion of the following concepts: *jus cogens*, universality, sources of international law, international criminal law, slavery, piracy, *erga omnes*, peremptory norms, treaty law, the Vienna Convention of the Law of Treaties,

⁹ For a detailed list of the purchasing sites and the textbooks’ titles, authors, and publishing years, see Appendix.

state obligations, state responsibility, and human rights. These key terms provide the reader of these textbooks an understanding of the author's stance on peremptory norms as an international legal concept. When the textbooks are analyzed for these key terms, a series of rhetorical themes develops. As will be seen below, no single text outright dismisses the concept of *jus cogens*, which is a shift from the initial stages of the understanding of *jus cogens* in the international community as discussed in Chapter II above. However, there are variations in the strength, extent, scope, and import of the rhetoric of *jus cogens*.

General Textbook Information

The sample of textbooks represent a wide variety of style and philosophical orientations. While some of the textbooks are more traditionally for legal texts organized with edited readings from other authors followed by questions for the individual student, others are written more as supplements or general outlines for quick reference for the student or practitioner. Some texts concentrate more on the interaction between United States law and international law. Other texts provide a broader, all-encompassing viewpoint that includes cases from the United States, the International Court of Justice, and other judicial bodies, such as the European Court of Human Rights. The different philosophical orientations are noticeable in case selections and provided discussions and/or questions. The variety of textbooks provides further support for a generally accepted understanding of *jus cogens* rhetoric, as there are still general themes of rhetoric that are shared by all of the writings.

¹⁰ For further information concerning the selection of individuals textbooks, see Appendix.

All of these texts are written for individuals who will become part of the epistemic community, either in international law or international relations. These are the individuals who will continue the perpetuation of the international legal system by becoming advisors, practitioners, legal scholars, legal educators, or policy influencers.¹¹ The texts start with an assumption that individuals using these books are just starting to develop their understanding of the international legal system and continue to build on basic concepts through the entire book. This approach provides a clear blueprint of the method of indoctrination of the new members of the epistemic community. This blueprint also provides an understanding of the rhetoric of *jus cogens* for this study.

None of the textbooks examined failed to discuss *jus cogens* and all of them viewed the subject as a well-established legal concept. *Jus cogens* is treated in all the texts as a legal concept deserving of its fundamental status. The most important rhetorical themes presented in these textbooks are examined in greater depth below.

RHETORICAL THEMES

There are several common rhetorical themes that emerge in the understanding of *jus cogens* presented in the international law textbooks. These rhetorical themes demonstrate the common understanding of *jus cogens* conveyed in the epistemic community of international lawyers. The following five themes are common to the discussion of *jus cogens* in textbooks examined as part of this study. These themes survey the role of treaties, the evolution of *jus cogens* to an autonomous concept, issues of jurisdiction, the philosophical underpinnings, and the scope and extent of peremptory norms. Each one of these five themes is a portion of the overall belief system that shapes

¹¹ Scott, 2010, 133-135.

the understanding of *jus cogens* and is fully demonstrated by the writing in these textbooks, thus being perpetuated through the education of new lawyers. The following examines each of these theses in greater depth.

Theme One: Jus Cogens, VCLT and Treaty Law

The importance of the VCLT to the acceptance and establishment of *jus cogens* is the first noticeable theme. Every textbook that was examined looked at the interaction between treaty law and *jus cogens* in light of the VCLT. As previously mentioned, Articles 53 and 64 of the VCLT provided for the formalization of *jus cogens*. Different approaches were used by the authors to convey the relationship between the VCLT and *jus cogens*. Some authors provide historical approaches for the basis of their discussions; other authors examine specific treaties that would be invalidated by peremptory norms under current international law. The non-historical approach is typically a statement of the legal concepts contained within the articles of the VCLT as relating to peremptory norms as an accepted notion in international law. Both of these general methods concentrate on the relationship between *jus cogens* and treaty law, in particular the interaction between the concepts of *jus cogens* and the provisions provided in the VCLT.

Historical Approaches

There are two types of historical approaches that fall into this rhetorical theme. The first is a historical examination conducted by some authors that highlights the role of the VCLT as the catalyst for the modern development and acceptance of peremptory norms in the international legal system. Another historical approach is to provide the

reader with examples of treaties throughout history that would now fall into a category of violating peremptory norms, thus being voided under current international law.

In the first historical approach, the common theme of discussion is to look at what the VCLT states, how it was negotiated, and what its effects are on possible treaties and on local and special customary law when using a historical analysis. In the international law system prior to the establishment of *jus cogens*, a state could enter into any agreement or treaty with any other state with any subject matter, regardless of the content or unconscionable nature of the subject. This restriction is discussed by Buergenthal and Murphy in *Public International Law in a Nutshell* when they discuss *jus cogens* as “the only limitation” on the “absolute freedom” of states to enter into treaties.¹² This restriction is exemplified in *International Law and International Relations* when one of the authors asserts that how *jus cogens* is a binding rule that “creates an especially strong legal obligation, such that it cannot be overridden even by explicit agreement among states.”¹³ This is a fundamental change in the international legal system from the historical practice. Prior to World War II, states enjoyed freedom of treaties. It is not surprising then, that Aust notes that the concept of *jus cogens* “was once controversial.”¹⁴ The controversial history of *jus cogens* is the beginning point for these authors, not the end, thus the existence of *jus cogens* is no longer considered controversial, as seen below.

The employment of historical analysis by the textbooks’ authors provides a starting point for the introduction of *jus cogens* to the readers. These textbooks that rely

¹² Thomas Buergenthal and Sean D. Murphy, *Public International Law in a Nutshell* (St. Paul, MN: West Publishing Company, 2007), 123.

¹³ Kenneth W. Abbot, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, “The Concept of Legalization,” 116 note 2 in Beth A. Simmons and Richard H. Steinberg (eds.), *International Law and International Relations*, (New York: Cambridge University Press, 2006), 115-130.

¹⁴ Aust, 2010, 10.

on this historical analysis, such as *International Law, Norms, Actors, Process: A Problem-Oriented Approach*, provide both treaty-based and state-consent support for *jus cogens*.¹⁵ The historical approach looks at the role of self-interest in the VCLT negotiations and how the issues raised there connect to the general international law debates, such as the positivism versus naturalism.¹⁶ If the existence *jus cogens* is treated as controversial, then it generally revolves around this period of the development *jus cogens*. The debate has now shifted to the scope of *jus cogens*.¹⁷ This historical approach has also been used to show the once controversial emergence of *jus cogens* as “principles and rules of international law with a higher legal status than the other parts of international law.”¹⁸

In the second historical approach, concrete examples are used to provide further understanding of the effects of the VCLT. For example, the treaty from 1762 between the Netherlands and the Saramak agreeing to “capture any slaves that have deserted, take them prisoner and return them to the Governor of Suriname, who will pay them 10 to 50 florins per slave” is cited by the authors of *International Law in Contemporary Perspectives*.¹⁹ Another historical example, provided by Slomanson, is of “Stalin and Hitler’s then secret 1939 agreement to divide Europe,” as it violates the prohibition of force.²⁰ While it may be difficult for the student to conceive of a state promulgating such a treaty today, these historical examples do demonstrate not only the need for the

¹⁵ Jeffrey Dunoff, Steven Ratner, and David Wippman, *International Law, Norms, Actors, Process: A Problem-Oriented Approach*, 2nd Ed., (New York: Aspen Publishers, 2006).

¹⁶ Dunoff, Ratter, and Wippman, 58-60.

¹⁷ Dunoff, Ratner, and Wippman, 59.

¹⁸ Peter Malanczuk, *Akehurst’s Modern Introduction to International Law*, 7th Ed., (New York: Routledge, 2003), 30-31.

¹⁹ Michael W. Reisman, Mahnoush H. Arsanjani, Siegfried Wiessner, and Gayl S. Westerman, *International Law in Contemporary Perspectives*, (New York: Foundation Press, 2004), 1301.

VCLT's explicit formalization of *jus cogens*, but also the historically unfettered power of the states to enter into agreements, regardless of public policy or notions of justice and equality.

The Non-Historical Approach

Other authors concentrate less on the historical background of the VCLT choosing instead to highlight the invalidation of treaties that flows from peremptory norms as specified by the VCLT. They accept that the VCLT is an essential foundation for understanding treaty law and then go on to explain the different aspects of the VCLT, including the provisions on *jus cogens*.²¹ Malone, for example, concentrates the majority of the discussion of the VCLT and *jus cogens* around Articles 53 and 64 as it relates to the invalidation of treaties that conflict with peremptory norms, thus glossing over the historical development of the VCLT.²² Dixon, McCorquodale, and Williams also avoid a discussion of the development of the VCLT but provide analysis by dividing the treaty into individual sections and adding scholarly writings and case law that cover broad topics, such as invalidity of treaties and interruption of treaties.²³ These authors also assert that the provisions contained within the VCLT are “a limitation on State sovereignty” and have been broadly accepted throughout the international community.²⁴

Authors also use this approach to show the fundamental aspect of peremptory norms, in which, these norms prevent the derogation by states, even if this is a state's

²⁰ William R. Slomanson, *Fundamental Perspectives on International Law*, 5th Ed., (Belmont, CA: Thomason-Wadsworth, 2007), 374.

²¹ Shaw, 2008, 125.

²² Linda A. Malone, *Emanuel Law Outlines: International Law*, (Larchmont, NY: Emanuel Publishing Corp., 2008).

²³ Dixon, McCorquodale, and Williams, 2011, 55-100.

²⁴ Dixon, McCorquodale, and Williams, 2011, 93.

will, including preventing a state from “passing contrary legislation.”²⁵ This approach is also used to demonstrate the inability for persistent objection to exempt a state from being bound by a customary rule of international law if it contravenes a peremptory norm.²⁶

VCLT and Peremptory Norms

Regardless of the approach taken by the authors, the main point that these textbooks make is that *jus cogens* has the ability to invalidate treaties. The peremptory norm in question can be a long-standing norm or a recently developed norm as long as it meets the requirements of being peremptory. The invalidity of a treaty under the VCLT is compared by Bederman, Shaw and Lowe to public policy exceptions to contracts and laws within the domestic legal system, where these instruments are found to be invalid due to violations of public policy.²⁷ According to Malone, when a treaty is found to be in conflict with a *jus cogens* norm, “the entire treaty is void and there is no separability” of the offending provisions or sections of the treaty in question.²⁸ According to the majority of the discussed texts, the invalidation of treaties has also been extended to the invalidity of local customs or international customs if they are found to be in conflict with peremptory norms.

The epistemic community appears to be this treaty for the establishment of *jus cogens*, with the occasional reference to historical cases and Verdross’s seminal article

²⁵ Epps, 2009, 11.

²⁶ Epps, 2009, 21.

²⁷ Malcolm N. Shaw, *International Law*, 5th Ed., (New York: Cambridge University Press, 2003). *See also* Vaughn Lowe, *International Law*, (Oxford: Oxford University Press, 2007) and David J. Bederman, *International Law Frameworks*, (New York: Thomson Reuters/Foundation Press, 2010).

²⁸ Linda Malone, *International Law*, 2nd Ed., (New York: Wolters Kluwer, 2011), 37.

from 1937, “Forbidden Treaties in International Law.”²⁹ While there may be some disagreement about the nature and status of *jus cogens* before the VCLT, there is near unanimity in the epistemic community about *jus cogens* since then. Some authors, such as Malanczuk, do venture far back into the development of *jus cogens* by starting with its natural law roots before moving to more modern foundations found in the VCLT and the related negotiations.³⁰ While the VCLT is the starting point for the development of *jus cogens* in modern international law according to the rhetoric, the evolution of *jus cogens* does not stop with the VCLT.³¹

Theme Two: Jus Cogens as an Autonomous Concept

The second theme to emerge is the acceptance of *jus cogens* as a well-established autonomous concept in international law. Authors Von Glahn and Taulbee place *jus cogens* in a “category of rules deserv[ing] special attention” because they are “considered so fundamental and significant to the structure and functioning of the international community that they bind states even if the state has not given formal consent.”³² This special category of rules is not related to the VCLT in their analysis. Despite the fact that the jumping off point for *jus cogens* discussion is the VCLT, the consideration of *jus cogens* as an autonomous concept can be seen in the discussion provided by the examined textbooks.

²⁹ Alfred von Verdross, “Forbidden Treaties in International Law,” *American Journal of International Law* 31 (1937), 571-577.

³⁰ Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th Ed., (New York: Routledge, 2003).

³¹ Evans, 2010.

³² Gerhard Von Glahn and James Larry Taulbee, *Law Among Nations: An Introduction to Public International Law*, 10th Ed., (Boston: Pearson, 2010) 59-60.

The first evidence that *jus cogens* is a stand-alone concept is the discussion of the hierarchy of international law norms being highlighted in a majority of these textbooks. This hierarchy or normativity discussion does not refer to *jus cogens* in relation to the invalidation of treaties, but looks at the place of *jus cogens* in general international law. As Murphy states in *Principles of International Law*, “one way to think about *jus cogens* is as ‘super’ customary international law – law so fundamental to the inter-relationship of states that a state cannot, through its treaty practice or otherwise, deviate from the law.”³³ This “international constitutional law” is filled with norms that “set the very foundations of the international legal system.”³⁴ Another example in Shaw’s *International Law* centers the discussion of International Court of Justice.³⁵ According to this analysis, *jus cogens* “are substantive rules recognized to be of a higher status.”³⁶ This higher status is also recognized by Aust when he acknowledges that it “seems to be generally accepted that provisions in Security Council resolutions must not be incompatible with *jus cogens*.”³⁷

The second evidence of the autonomous nature of *jus cogens* is the discussion of peremptory norms as a source of prescription for behavior, such as a deterrent for action, and obligations, such as extradition of violators. The VCLT provides the simple invalidation of treaties, not for the increased state responsibility that is currently being advocated by the epistemic community of international lawyers. For example, Brownlie in *Principles of Public International Law* deals with the issue of recognition of a breach of peremptory norms by examining certain provisions of Chapter III of Part Two in the

³³ Sean D. Murphy, *Principles of International Law*, (St. Paul, MN: Thomson-West, 2006), 82.

³⁴ Mark W. Janis, *An Introduction to International Law*, 4th Ed., (New York: Aspen Publishers, 2003), 66.

³⁵ Malcolm Shaw, *International Law*, 6th Ed., (Cambridge: Cambridge University Press, 2008), 123-126.

³⁶ Shaw, 2008, 125.

Articles Relating to the Responsibility of States. These provisions fall into the category of “Serious Breaches of Obligations Under Peremptory Norms of General International Law,” which the author quotes at length and then cautions that the “normative structures look very progressive on paper but, in certain political circumstances, the result may be to give the appearance of legitimacy to questionable policies based on objectives collateral to the enforcement of the law.”³⁸ Despite the warning against using *jus cogens* obligations for political motives, Brownlie firmly supports the existence of *jus cogens* as an autonomous concept in international law as evidenced by his description and discussion of peremptory norms as a group of “overriding principles of international law” as supported by “both doctrine and judicial opinion” where “the major distinguishing feature of such rules is their relative indelibility.”³⁹ Cassese’s middle of the road explanation of the effect of *jus cogens* on the international system is further evidence as it states that these norms “primarily pursue a deterrent effect,” but he reminds the reader that “one should not underrate the role [that] peremptory norms may play in guiding and channeling the conduct of States.”⁴⁰ This deterrent effect, or shift in “the attitudes of states,” impacts the international legal system as it changes how a number of issues are addressed, such as the legitimate use of force.⁴¹ The influence of *jus cogens* on the attitudes, obligations, and duties of states flows from the autonomous nature of *jus cogens* beyond the VCLT.

³⁷ Aust, 2010, 277.

³⁸ Ian Brownlie, *Principles of Public International Law*, 7th Ed., (New York: Oxford University Press, 2008), 515.

³⁹ Brownlie, 2008, 510.

⁴⁰ Antonio Cassese, *International Law*, 2nd Ed., (New York: Oxford University Press, 2005), 210.

⁴¹ Martha Finnemore and Stephen J. Toope, “Alternatives to ‘Legalization’: Richer Views of Law and Politics,” 191 in Beth A. Simmons and Richard H. Steinberg (eds.), *International Law and International Relations*, (New York: Cambridge University Press, 2006), 188-204.

The final evidence of the autonomous nature of *jus cogens* is change in the controversial questions surround peremptory norms. The controversy that used to surround *jus cogens* was one of existence; however, the controversy is no longer based on mere existence as that has been accepted, but revolves around other concepts, such as the scope and nature of *jus cogens*. This shift in the nature of the debate shows that the concept has moved beyond its original slightly controversial status in the VCLT to a solidified legal concept breadth of which is still being hammered out in the international legal community.⁴² As *jus cogens* is viewed as “customary law considered so fundamental and significant to the structure and functioning of the international community that they bind states even if the state has not given formal consent,”⁴³ it no longer is bogged down in the issue of only being applicable to states that have agreed to the VCLT and is now an autonomous concept.

Theme Three: Jus Cogens and Jurisdiction

The third theme is the application of *jus cogens* to overcome a variety of jurisdictional issues. Peremptory norms fall into a specialized jurisdictional category known as the universal principle or universal jurisdiction. Universal jurisdiction means any state can prosecute regardless of the location of the incident, the perpetrator’s nationality, or the victim’s nationality. Universal jurisdiction is a fundamental aspect of peremptory norms.

When applying *jus cogens*, the textbooks discuss two main reasons that traditional jurisdictional standards are circumvented by this application. The first is the concept of

⁴² Anthony Aust, *Handbook of International Law*, (New York: Cambridge University Press, 2005), 11.

hierarchy in international law. As previously discussed, the hierarchy of international law places *jus cogens* at the pinnacle of the mountain. This special place within the international legal system provides for the ability to supersede jurisdictional restrictions, such as territorial jurisdiction.

The second concept is one of justice or morality contained within the law. The morality or justice that is contained within *jus cogens* indicates “common values” of the international community that allow for universal jurisdiction for certain international crimes that fall into the category of peremptory norms.⁴⁴ According to Slomanson, “the universality principle is not applied to a ‘common crimes’ such as murder, because it is not sufficiently outrageous.”⁴⁵ The heinous nature of the crime is “the jurisdictional linchpin” to allow States to exercise jurisdiction.⁴⁶ In addition to the heinous nature of these concepts, if the action is considered to have “a corrosive effect on international society,” then they will be subject to universal jurisdiction.⁴⁷

Jus cogens has been applied by the courts, especially in the United States, in a variety of cases. One of the most common uses is to contravene the Act of State Doctrine in civil actions.⁴⁸ The immunity against civil actions provided to sovereigns acting as state leaders has been waived based upon concepts of *jus cogens*. Peremptory norms also allow international law to be applied for “claims against individuals that are based on a handful of particularly egregious offenses.”⁴⁹

⁴³ Gerhard Von Glahn and James Larry Taulbee, *Law Among Nations: An Introduction to Public International Law*, 8th Ed., (New York: Pearson Longman, 2007), 68.

⁴⁴ David Armstrong, Theo Farrell and Helene Lambert, *International Law and International Relations*, (New York: Cambridge University Press, 2007), 181-182.

⁴⁵ Slomanson, 2007, 245.

⁴⁶ Slomanson, 2007, 245.

⁴⁷ Aust, 2010, 250.

⁴⁸ Buergenthal and Murphy, 359-360.

⁴⁹ Buergenthal and Murphy, 2007, 207. *See also* Buergenthal and Murphy, 2011.

In addition to overcoming issues of sovereign immunity and applicability, *jus cogens* also “carries the duty to prosecute or extradite offenders,” and cannot be “superseded by international agreements or policy decisions.”⁵⁰ This duty overcomes territorial jurisdiction and personal jurisdiction, thus allowing for prosecution for *jus cogens* offenses and creating universal jurisdiction. These nonderogable norms, thus norms that “cannot be denied or suspend[ed] under any circumstances,” include the prohibitions against piracy and slavery.⁵¹

Theme Four: Positivist and Naturalist Approaches to Jus Cogens

The fourth theme is that the controversy over *jus cogens* and its content is still tied to the debate between the positivists and the naturalists as to the sources and nature of international law. While most authors do not rehash the last five hundred years of international law in their textbooks, there is at least some discussion of the battling theoretical underpinnings of the international legal system. In the context of the development of the peremptory norm prohibiting slavery, Bederman looks at the different underpinnings of this evolution. The naturalists looked at slavery as “an abomination” that State conduct would be subordinate.⁵² He then explains that in the case of positivists, the case was not as simple and had to eventually be decided by the United States’ and English courts by claiming a necessity for an explicit agreement.⁵³ While it has been claimed that “most international lawyers...are willing to go beyond treaties and custom to general principles of law, natural law, *jus cogens*, and equity to find

⁵⁰ Christopher C. Joyner, *International Law in the 21st Century: Rules for Global Governance*, (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2005), 135.

⁵¹ Joyner, 2005, 135.

⁵² Bederman, 2010, 4.

⁵³ Bederman, 2010, 4.

international law,”⁵⁴ the use of the classic debate between the positivists and the naturalists as to the source of international law principles has come to the forefront when discussing the existence and expansion of *jus cogens* due to its nonconsensual, yet binding nature.

The concept of *jus cogens* naturally lends itself to this discussion because of the expansion of the concept beyond the VCLT and the fundamental nature of peremptory norms. Many authors refer to *jus cogens* as being constitutional in nature or fundamental to the operation of the international legal system or similar to public policy. These can be seen as rhetorical pseudonyms for natural law since the treaty basis of *jus cogens* has been rhetorically left behind. For example, Janis and Noyes open their discussion of *jus cogens* by noting “historically, one of the most important sources of the law of nations was natural law, but nowadays the function of this avowedly non-consensual source has been largely replaced by the notion of *jus cogens*.”⁵⁵

Since the ascending of positivism over the last two centuries, most of the international legal community would hesitate to suggest that obligations arise without direct treaty support or support from well-established customs; however, *jus cogens* opens the door for the insertion of natural law precepts, such as ethics or morality, into the international legal system. This insertion is in direct contradiction with the positivist tradition, thus providing new life to the age old debate between the two philosophies. Some authors, such as Scott, suggest a trend in international legal debate where the increased acceptance of *jus cogens* creates a situation in which “legal positivism must

⁵⁴ Mark W. Janis, *International Law*, 5th Ed., (New York: Aspen Publishers, 2008), 45.

⁵⁵ Mark W. Janis and John E. Noyes, *Cases and Commentary on International Law*, 3rd ed., (St. Paul, MN: Thomson-West, 2006), 138.

either evolve to make room for such a notion or be replaced.”⁵⁶ This renewed debate is labeled “the last ground for potential conflict between treaties and custom.”⁵⁷ Despite this renewed debate, it is of note that even authors, such as Dixon, who are staunch supporters of positivist sources of international law, support the *jus cogens* rhetoric.⁵⁸

Theme Five: The Content of Jus Cogens

The fifth theme revolves around the scope and potential expansion of the content of *jus cogens* content. Beyond the prohibitions against piracy and slavery, there is a lack of full consensus on the individual norms that fall into the category of *jus cogens*, but a number of norms that are consistently used as examples. This uncertainty has kept some states from ratifying the VCLT, such as France.⁵⁹ This is viewed by some textbooks as a shortcoming of peremptory norms because of the vague boundaries that prevent a well-established list of norms that are part of *jus cogens*, thus decreasing specificity in the international legal system. Despite the lack of consensus on what norms are peremptory, “few would now doubt that the rules of *jus cogens* do exist” and at a minimum “take precedence over all treaties.”⁶⁰ Despite this ambiguity as to the breadth of *jus cogens*, there is agreement in some areas.

This research project concentrates on the two oldest peremptory norms in international law: the prohibitions against piracy and slavery. These are not the only prohibitions that are considered by the epistemic community to be an unambiguous part

⁵⁶ Shirley V. Scott, *International Law in World Politics: An Introduction*, (Boulder, CO: Lynne Rienner Publishers, 2004), 301.

⁵⁷ David J. Bederman, *International Law Frameworks*, 2nd Ed., (New York: Foundation Press, 2006), 31.

⁵⁸ Martin Dixon, *Textbook on International Law*, 6th Ed., (New York: Oxford University Press, 2007).

⁵⁹ Lowe, 2007, 76.

⁶⁰ Martin Dixon and Robert McCorquodale, *Cases & Materials on International Law*, 4th Ed., (New York: Oxford University Press, 2003), 43.

of the *jus cogens* cannon. For example, the prohibition on genocide is often cited as having “clearly reach the level of a peremptory norm.”⁶¹ The status was affirmed by the International Court of Justice in *Congo v. Rwanda* in 2006.⁶² Since the prohibition against genocide is *jus cogens*, then it cannot be derogated by treaty.⁶³ Another prohibition that is considered to have risen to the status of *jus cogens* is torture. Torturers are also viewed as “enemies of all mankind” like pirates and slavers.⁶⁴ This observation comes from seminal case concerning the prohibition on torture’s place among peremptory norms, thus allowing for the application of universal jurisdiction.⁶⁵ In *Kadic v. Karadzic*, the Second Circuit of the United States Court of Appeals found that the prohibition on torture was *jus cogens* and therefore imposes obligations *erga omnes*, which is highlighted by Dixon, McCorquodale and Williams in their chapter on international human rights law.⁶⁶ Prohibiting war crimes has also been considered a peremptory norm.⁶⁷ War crimes are considered by Carter, Trimble and Bradley to be one of the few “clear-cut cases of universal jurisdiction.”⁶⁸ Crimes against humanity, terrorism, and war crimes are also subject to universal jurisdiction and obligations *erga omnes*.⁶⁹ Janis and Noyes, quoting The National Security Strategy of the United States of America from September 2002, highlight that terrorism is “behavior that no respectable government can condone or support and all must impose” to provide continued support

⁶¹ Epps, 2009, 81.

⁶² Evans, 2010, 150.

⁶³ Bederman, 2010, 103.

⁶⁴ *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, House of Lords, U.K. (24 March 1999). See also Janis and Noyes, 24.

⁶⁵ Dixon, McCorquodale and Williams, 2010, 151-152.

⁶⁶ Dixon, McCorquodale and Williams, 2010, 202-203.

⁶⁷ *Abdullahi v. Pfizer, Inc.*, 562 F.3d. 163 (2d Cir. 2009).

⁶⁸ Carter, Trimble and Bradley, 654.

⁶⁹ Scott, 2010, 25.

for placing terrorism in the same category of “slavery, piracy, or genocide.”⁷⁰ The prohibition against the use of force is often characterized as having the character of a peremptory norm.⁷¹ The most commonly accepted norms that are consistently mentioned as *jus cogens* are the prohibitions on the use of force, genocide, slavery, piracy, torture, and apartheid and the right to self-determination.

Since the scope of *jus cogens* is not rhetorically well-established, there have been attempts to expand the number of norms that fall into this category. A number of authors stressed the continued expansion of the concept of peremptory norms and an increase in the use of *jus cogens* to punish individuals and states for their behavior in external and internal matters. In addition to attempts to add new norms, there is rhetoric indicating that there will also be greater application of the norms to new actors, such as international organizations. In Evans’s *International Law*, Thirlway looks at how a norm would qualify as peremptory by stating “it is accepted that the status of peremptory norm derives from the importance of the content of the norm to the international community: an example is the prohibition of genocide.”⁷² How these norms are determined or what meets the level of importance to the international community is not fully developed in any of the textbooks, but is discussed by a number of authors, with the only conclusion being that it is still controversial.

New peremptory norms are put forth in the international legal system, such as prohibition of environmental degradation. Authors of *International Law and World Order: A Problem-Oriented Coursebook* claim that “there conceivably may be some

⁷⁰ Janis and Noyes, 568.

⁷¹ *Case Concerning Military and Paramilitary Activities in and against Nicaragua: Nicaragua v. United States*, 1986 I.C.J. 14 (Merits).

norms of good environmental behavior so basic and fundamental to the future of the planet that nations cannot do as they please about following them.”⁷³ As the expansion of the content of *jus cogens* is still controversial, Epps discusses a lack of support for considering environmental damage to be part of the corpus of *jus cogens*.⁷⁴ Other prohibitions that have been raised as peremptory norms include using nuclear weapons,⁷⁵ drug trafficking,⁷⁶ and self-determination as it applies to situations of colonialism.⁷⁷

One textbook incorporates the expansion of *jus cogens* discussion throughout a number of other addressed subjects. In *International Law: Cases and Materials*, Damrosch, Henkin, Pugh, Schachter, and Smit look at cases involving everything from international criminal law (torture and slave trade) to the principle of sovereignty of national resources in opposition to “remote sensing” in that the sensing state has “an obligation to obtain the prior to consent of the sense state before data based on the sensing could be obtained or disseminated.”⁷⁸ By examining the expansion of the content of *jus cogens* throughout the text and its relationship to a wide variety of different other legal concepts or situations, these authors are demonstrating how pervasive *jus cogens* can be in the international legal rhetoric. While this textbook is on one end of the spectrum of *jus cogens* expansion, it is also one of the more popular texts and represents the possible strength of *jus cogens* rhetoric.

⁷² Hugh Thirlway, “The Sources of International Law,” 141-142 in Malcolm D. Evans (ed.), *International Law*, (New York: Oxford University Press, 2003), 117-144.

⁷³ Burns H. Weston, Richard A. Falk, Hilary Charlesworth, and Andrew L. Strauss, *International Law and World Order: A Problem-Oriented Coursebook*, 4th Ed., (St. Paul, MN: Thomson-West, 2006).

⁷⁴ Valeris Epps, *International Law*, 3rd Ed., (Durham, NC: Carolina Academic Press, 2005).

⁷⁵ *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226 (Advisory Opinion) found in Epps, 2009, 462.

⁷⁶ Epps, 2009, 210.

⁷⁷ Dixon, McCorquodale and Williams, 2010, 222.

⁷⁸ Lori Fisler Damrosch, Louis Henkin, Richard Crawford Pugh, Oscar Schachter, and Hans Smit, *International Law: Cases and Materials*, 4th Ed., (St. Paul, MN: West Group, 2001), 1561.

Even though there is a push by many in the international legal community to expand and piggy-back onto the concept of *jus cogens*, McCaffrey cautions “there are still only a very few norms of *jus cogens*, which means that states are free to contract out of the overwhelming majority of rules of general international law.”⁷⁹ Although McCaffrey is correct to be cautious in discussing expansion, the amount of textbook rhetoric that is devoted to this concept shows that this is a growing area of discussion in the international legal community. Overall, the increased content and application debates are a natural progression from the existence debate that was the former center of controversy concerning peremptory norms. Despite the fact that the rhetorical scope of *jus cogens* is not as strong as the general rhetoric for the existence of peremptory norms, the epistemic community is consistent in accepting that it does not fully know the scope.

CONTINUITY WITHIN THE RHETORIC

The understanding of *jus cogens* in the epistemic community is further illuminated by viewing the community’s written record over time. This is possible because a number of international law textbooks used for this research project released subsequent editions. In many cases, the authors have continued their viewpoints concerning *jus cogens*. No authors narrowed their discussion of peremptory norms and, in some cases, expanded their viewpoint to encompass additional subjects under the umbrella of *jus cogens* or to provide more support for the concepts surrounding peremptory norms. This provides a measure of evidence that a continuity exists within the rhetoric of the epistemic community. Often the authors selected the same cases, documents, wording, and viewpoints between the different editions of their textbooks.

⁷⁹ Stephen C. McCaffrey, *Understanding International Law*, (Newark, NJ: LexisNexis, 2006), 125.

In Valerie Epps' *International Law*, the difference between the 2005 and 2009 editions is negligible concerning the subjects relating to *jus cogens*. For example, she discusses the "certain amount of agreement over core activities that trigger universal jurisdiction," such as "piracy [and] slave trade" and provides support with the case *Attorney General of the Government of Israel v. Eichmann*.⁸⁰ This is the exact wording and case that is provided in both editions.⁸¹ Shirley Scott expanded her second edition by including more information on the law of armed conflict. Her book maintains a continuity of her analysis of *jus cogens*, its place within the international legal system, and the offenses that are deemed peremptory norms.⁸² Some authors do not provide any changes concerning peremptory norms in international law, thus maintaining exact continuity concerning these subjects. This continuity is also apparent in Bederman's editions. He provides the exact same information concerning *jus cogens*, universal jurisdiction, piracy and slavery.⁸³ Malone also does not expand her discussion of *jus cogens* in her updated version of *International Law* despite a difference of over ten years between editions.⁸⁴

In *Public International Law in a Nutshell*, the authors concentrate on how treaties that contravene peremptory norms are null and void over the course of three editions.⁸⁵ Once *Kadic v. Karadzic* had been decided in 1995, between the second and third editions of the textbook, the authors added more information about individual liability under international law. This shows that, if anything, the rhetoric of *jus cogens* in this series of

⁸⁰ Epps, 2005, 106 and 111 and Epps, 2009, 115 and 119.

⁸¹ Epps, 2005, 106 and 111 and Epps, 2009, 115 and 119.

⁸² Scott, 2004 and Scott, 2010.

⁸³ Bederman 2006 and Bederman, 2010.

⁸⁴ Malone, 2011. *See also* Malone, 1998.

⁸⁵ Buergenthal and Murphy, 1990. *See also* Buergenthal and Murphy, 2007 and Buergenthal and Murphy, 2011.

international texts is becoming more expansive and stronger. Another example of the strengthening of the *jus cogens* rhetoric is seen in Von Glahn and Taulbee's tenth edition. Between their 2007 and 2010 textbooks, they added that "the current widely accepted view asserts that peremptory norms do exist" and eliminated some of the discussion on the possible controversy surrounding the scope of the category of peremptory norms.⁸⁶ Aust also added information on *jus cogens* that strengthened the rhetoric of the peremptory norms based on the continued support for obligations *erga omnes* found in ICJ decisions and advisory opinions published after his first edition.⁸⁷ Dixon, McCorquodale and Williams also added more resources and information to support the expansion of *jus cogens* by including documentation that was not available when the previous edition was printed that supports the concepts contained in the rhetoric of *jus cogens*.⁸⁸ Another author who added more information concerning peremptory norms between editions was Malanczuk by increasing the of documentation support for *jus cogens*.⁸⁹ These authors are not only providing continuity of their original rhetoric provided in their textbooks, but are adding to the robustness of *jus cogens*.

One of the most expansive increases in a concentration on peremptory norms issues can be seen in Shaw's 2011 edition of *International Law*. He includes an entire chapter on the "Individual Criminal Responsibility in International Law" that was not available in the previous edition.⁹⁰ He examines the development of individual responsibility as it flows from its creation to deal with pirates and slave traders to its

⁸⁶ Von Glahn and Taulbee, 2010. *See also* Von Glahn and Taulbee, 2007.

⁸⁷ Aust, 2010, 7 n. 20 and 10.

⁸⁸ Dixon, McCorquodale and Williams, 2010, 204, and 528-529.

⁸⁹ Malanczuk, 1997. *See also* Malanczuk, 2003, 57-60.

⁹⁰ Shaw, 2011, xxi and 397-443.

expansion under the Nuremberg Tribunal.⁹¹ This chapter also covers the establishment of the International Criminal Tribunal for the Former Yugoslavia in 1993 and the International Criminal Tribunal for Rwanda in 1994.⁹² After establishing a history of judicial bodies created to deal with violations of peremptory norms, such as the Bosnia War Crimes Chamber and the Iraqi High Tribunal, Shaw then explains what crimes fall into this category, such as genocide and aggression.⁹³ This chapter provides overall picture of these recent developments in jurisprudence. Evans also added information on responsibility in international law, known as “R2P” or “the responsibility to protect.”⁹⁴ This chapter, written by Spencer Zifcak, provides the history of the doctrine, including its “intellectual and political development both before and after the adoption of the World Summit resolutions that embodied it.”⁹⁵ The chapter states that there is “a responsibility individually and collectively [among United Nations members] to protect their peoples from the commission of mass atrocity crimes.”⁹⁶ While there is an acceptance of the responsibility, R2P is still on unsure footing in the international community and is considered by many states to be “a doctrine of primarily of a political rather than legal character.”⁹⁷ According to the author, this is “but a fledgling rule of international customary law” that has “some considerable way to go” prior to it being “regarded as having been adopted in practice and obtained the requisite international acceptance to be considered as fully formed.”⁹⁸ The information contained in Shaw’s and Evans’ textbooks concerning responsibility and action on the part of the international community

⁹¹ Shaw, 2011, 398-402.

⁹² Shaw, 2011, 402-410.

⁹³ Shaw, 2011, 410-440.

⁹⁴ Evans, 2010, xxvii and 504-527.

⁹⁵ Spencer Zifcak, “The Responsibility to Protect,” 504-527, 504 found in Evans, 2010.

⁹⁶ Zifcak, 521 found in Evans, 2010.

⁹⁷ Zifcak, 523 found in Evans, 2010.

could be seen as the beginning of a new principle relating to peremptory norms in international law. It is an interesting development, but does not appear to have achieved the status of rhetoric in the epistemic community.

WHAT DOES THE RHETORIC MEAN?

Overall, the rhetorical themes provide a picture of the current accepted understanding of peremptory norms in the international system. The starting point for most *jus cogens* discussion was the codification in the VCLT where the power of these norms to invalidate treaties was established. Even though some of these norms had existed prior to codification, the consent of states to be bound by the notion of *jus cogens*, while originally controversial, has become generally accepted. The concept of *jus cogens* moved from being a rather narrowly confined concept that related only to the invalidation of certain treaties to an autonomous concept. The autonomous concept is based on notions of hierarchy and normativity in international law and has moved beyond the concept of controversy among the international community of lawyers. As an autonomous legal concept, *jus cogens* now obligates states to perform certain duties and fulfill the policy aspects of peremptory norms by not derogating from these norms in either treaty, custom or public policy actions. This robustness and strength that has developed can be used to overcome jurisdictional issues. The robust nature of peremptory norms allows for these to be considered a fundamental or constitutional part of the international system.

Despite the robustness and hierarchical superiority of these peremptory norms, the legal concept is not without controversy in the international legal system. The content of

⁹⁸ Zifcak, 524, found in Evans, 2010.

what constitutes a peremptory norm, with the exception of norms like the prohibitions against piracy and slavery, is still a matter of great debate. There is a movement to expand the scope of *jus cogens* beyond the more traditional norms. The source of new peremptory norms is also hotly debated as the differences between the notions of positivism and naturalism come to the forefront. While the scope of the content of *jus cogens* is not necessarily established, the existence of peremptory norms in the international legal system is no longer debated, and is being used by many to try and boot-strap in a number of new norms into the category to achieve the same robust nature as the traditional norms in this area. The exceptions to this debate of scope are the prohibitions of piracy and slavery, as they are well-established and accepted peremptory norms.

This examination shows that in the view of international lawyers, as repeated in textbooks, *jus cogens* is the most robust category in international law, even if the full extent of the scope is not known. The lack of specificity that has developed over the scope is not likely to be resolved anytime soon. This robust nature places duties upon international actors to comply with these peremptory norms outside of considerations of individual state-interest, as they are fundamental to the international legal system. The epistemic community of international lawyers treats the overall concept as settled and fundamental. Despite controversies about the full content of *jus cogens*, the community treats the prohibitions against piracy and slavery as core components of *jus cogens*, which will be expanded in Chapters IV and V.

These rhetorical themes have significant impacts on the understanding of the international legal system. Since there is a general consensus among the community of

international lawyers, the perpetuation of the rhetoric is likely for future generations of the members. This provides for continuity of concepts within the system. This continuity can also be viewed as the foundation of the values and ideals of the community that have maintained an enduring strength. Since “international law is, in essences, a system of interrelated ideas,”⁹⁹ the ideals of the community become the foundation of the international legal system. Viewed in this context, the rhetoric found within international legal textbooks, as the written record of the aforementioned ideals, becomes vital to understanding the system.

CONCLUSION

The pervasive rhetoric of *jus cogens* is demonstrated in the above examples of international legal textbooks. The rhetoric shows that *jus cogens* is a well-established concept that is expected to provide a deterrent effect and is the basis for obligations for enforcement. While at the margins the scope of *jus cogens* is not fully established. There is no debate about the prohibitions against piracy and slavery. It is tempting as a reader of these textbooks to reduce everything to a mere philosophical debate between positivists and naturalists; however, even though the debate has been revived, the existence of *jus cogens* is no longer questioned, just the scope and effects of peremptory norms. In general, the *jus cogens* language has strengthened over time. Taken as a whole, the rhetoric of *jus cogens* cannot be denied and the extent of its influence on the epistemic community of international lawyers is significant.

In the next two chapters, the rhetoric is examined in relation to two of the oldest peremptory norms, the prohibitions against piracy and slavery. Since these are core

⁹⁹ Scott, 2010, 289.

norms of *jus cogens*, and peremptory norms are the strongest and most robust, reviewing these central tenets provides insight. The rhetoric of each peremptory norm is specified and then an examination of the reality of piracy and slavery is given to show that a significant gap exists between the rhetorical stance of the epistemic community and the reality of the international system.

CHAPTER IV

PIRACY AND REALITY

Piracy is the subject of one of the oldest prohibitions in international law and has clearly achieved the status of a *jus cogens* norm. The piracy, as examined in this chapter, goes beyond the recent popular attention to the events around the coast of Somalia. The incidents of piracy in other areas such as South America and the South China Sea have been increasing as has the violence associated with these events.¹ Piracy is one of the oldest prohibitions in international law and is also one of the longest standing peremptory norms that create obligations upon states to prosecute. The increase in piracy around the world is troubling for the individual seafarer and the shipping industry, but also for states. Seafarer could suffer from their possessions stolen or may even be maimed or killed during a pirate attack. The shipping industry has responded by instituting different practices and shipping routes, increasing insurance premiums, or hiring armed guards. States have allocated military resources to patrolling certain piracy-riddled areas to protect vessels.

The prohibition against piracy is the part of the core of peremptory norms. Given that it is one of the oldest international prohibitions and part of *jus cogens*, this norm is a crucial to determining the effectiveness of peremptory norms in the international legal system.

¹ International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Annual Report 1 January – 31 December 2010*, (London: ICC International Maritime Bureau, January 2011). See also International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Annual Report 1 January – 31 December 2011*, (London: ICC International Maritime Bureau, March 2012).

This chapter establishes the inconsistency between the two sources of international law contained in Article 38 of the *Statute of the International Court of Justice*: international custom as seen in the practice of states and the opinions and writings of publicists as seen in textbooks. Just because of the persistence of piracy throughout the world as seen through the lack of state action, it does not mean that it must actually be legal in the international system according to this study. Peremptory norms give rise to obligations. In particular, the prohibition against piracy requires states to seek out redress against violations. Current state practice falls short of the obligations to act against piracy. Even leading states, such as the United States, view the current reality as not having a regime for prosecuting pirates. As will be shown below, some states go further by colluding and sponsoring piracy around the world. This reality demonstrates an inconsistency between state practice and the legal rhetoric concerning piracy.

The following examines the gap between reality and rhetoric of international law with regard to piracy. By providing the historical context of the prohibition against piracy, the development of this norm into one of the core tenets of the canon of *jus cogens* is demonstrated. This understanding also provides credence to the crucial case methodology. Since *jus cogens* is a crucial case in the international legal system, as discussed in Chapter I, the historical support for the illegality of piratical acts indicates that this was one of the best examples to examine. This chapter then moves onto a detailed discussion of both sides of the rhetoric/reality gap. To determine the international legal community's side of the gap, the rhetoric that is discernible in international legal textbooks concerning piracy and its *jus cogens* status is surveyed. The

contemporary reality of piracy is analyzed to ascertain the opposite side of the gap.

Finally, the implications of the rhetoric/reality gap in the context of piracy are provided.

WHAT IS PIRACY?

Since mankind took to the waterways for private and public endeavors, piracy has been an issue. In 69 B.C., Pompey the Great was commissioned to subdue pirates, who were viewed as enemies to the sovereignty of Rome.² During Cicero's time, around 75 B.C., "pirates were seen as falling outside the otherwise universal norm that promises made under oath should be honored" because "with a pirate there is no common basis for either faith or oaths."³ And in Great Britain, written records from before the Middle Ages describe "Eustachius, the black monk, who terrorized the English Channel around 1200."⁴ These early examples caused pirates to be labeled as enemies of all mankind and for it to be noted that, "to pirates and wild beasts no territory offers safety."⁵ In 1413, England passed a law that "defined piracy as high treason."⁶ References to the word pirate and related words increased in frequency during the sixteenth century, culminating in a statute in 1700 in Great Britain that allowed "the holding of Admiralty Commissions to try pirates outside of England."⁷ This statute allowed for the prosecution of both the individuals who were pirates and those who "shall conceal such Pyrates, or receive any Vessel or Goods piratically taken, shall be adjudged accessory to such Pyracy, and suffer

² Alfred Rubin, *The Law of Piracy*, (Newport, RI: Naval War College Press, 1988), 7.

³ Armstrong, Farrell and Lambert, 2007, 39.

⁴ Dirk Meier, translated by Angus McGeoch, *Searfarers, Merchants and Pirates in the Middle Ages*, (Rochester, NY: Boydell Press, 2006), 7.

⁵ Alberico Gentili as quoted in Rubin, 1988, 23.

⁶ Janice Thomson, *Mercenaries, Pirates, and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe*, (Princeton, NJ: Princeton University Press, 1994), 23.

⁷ Rubin, 1988, 100.

as Principals;”⁸ however, its spread to all of the colonial ports was not until 1721, thus ending the Golden Age of piracy.⁹

The original Golden Age of Piracy was ushered in the 1690s. It arose for two main reasons. The first reason was the profit margins to be had in breaking the East India Company monopoly in trade with the American colonies.¹⁰ The second reason was the end of the wars between England and Spain eliminated the opportunities for privateers sailing under letters of marque. Prior to the issuing of letters of marque, “the terms freebooter, buccaneer, sea rover, and privateer were employed synonymously with the word pirate.”¹¹ During this period, a significant legal distinction existed between privateers and pirates. Letters of marque allowed the holder of the letter to be following the law but pillage and plunder the recognized enemy of the letter issuer. Privateers had the benefit of the “veneer of legality,” unlike pirates who “were simply outlaws.”¹² When the treaty between England and Spain was signed, the groups of men who were only trained to be pirates, decided to simply make “the transition from legal booty to illegal plunder...for it involved no great changes in habits or mental attitudes,”¹³ thus a large number of pirates plowed the seas. Eventually, piracy in the Atlantic was significantly diminished to end the Golden Age of piracy in 1725, but piracy, including some of the same individuals, continued to flourish in the South China Sea at similar levels. It is important to remember that piracy has never completely disappeared.

⁸ Daniel Defoe, *A General History of the Robberies and Murders of the Most Notorious Pyrates*, (New York: Garland Publishing, Inc., 1724, Reprint 1972), 320.

⁹ Hugh Rankin, *The Golden Age of Piracy*, (New York: Holt, Rinehart and Winston, Inc., 1969), 157.

¹⁰ James G. Lydon, *Pirates, Privateers, and Profits*, (Upper Saddle River, NJ: The Gregg Press, Inc., 1970), 45.

¹¹ Lydon, 1970, 25.

¹² Frank Sherry, *Raiders and Rebels: The Golden Age of Piracy*, (New York: Hearst Marine Books, 1986), 63.

¹³ Rankin, 1969, 23.

Eventually privateering was also outlawed with the Declaration of Paris in 1856. While the swashbuckling pirates of yesteryear are not sailing around in schooners any longer, modern day piracy has taken up the mantle of looting and plundering.

There have been historical discussions of piracy that claim that many who were accused of piracy were actually not pirates, but either falsely accused for political/economic reasons or suffering from a change in legal status from privateers to pirates. While these accusations often resulted in great harm to those who were accused, this is not a modern day problem or an overly common problem throughout history. It is mentioned here because of the pervasiveness of historical accounts of individuals, such as Captain Kidd, who arguably fell victim to a lack of communication of the change in the laws at the time, enemies in high places, and English parliamentary politics.¹⁴

Contemporary Definitions

The United Nations Convention on the Law of the Sea III (UNCLOS III), which is the current dominant treaty law, piracy is covered in Articles 100-107.¹⁵ Modern day piracy is often viewed as an “illegal act of violence or detention onboard a vessel on the high seas or outside the jurisdiction of the state,” which is in line with Article 101 of UNCLOS III.¹⁶ This definition does suffer from some controversy as it only includes actions that occur outside the territorial waters of a state, which some individuals claim unfairly limits the scope of piracy. The International Maritime Bureau (IMB) has a more

¹⁴ Douglas R. Burgess, Jr., *The Pirates' Pact: The Secret Alliances Between History's Most Notorious Buccaneers and Colonial America*, (New York: McGraw Hill, 2008), 239-240.

¹⁵ United Nations: Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs, *The Law of the Sea: United Nations Convention on the Law of the Sea: Agreement relating to the Implementation of Part XI of the United Nations on the Law of the Sea with Index and Excerpts from the Final Act of the Third United Nations Conference on the Law of the Sea*, (New York: United Nations, 2001), 57-58.

expansive definition that identifies piracy as “an act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act.”¹⁷ The difference between the two definitions is one of territorial jurisdiction. In the first definition, the act must occur on the high seas and the second definition allows for the act to occur if the ship is at sea, at anchor or berthed.

According to the IMB, there are six categories of modern piracy: Asian, South American, phantom ship, military/political attacks, attack on the high sea, and ransom.¹⁸ While two of these types of piracy have been assigned geographical designations, these types of piracy are not confined to the indicated geographical locations. Asian piracy is typically the least violent of all six types because violence is only used in direct response to attempted resistance. Such piracy is often successful because the targets are the cash and valuables of the crew members and the crew does not realize that the pirates are on board because of their skill in getting on and off the ship undetected while in port, straits, or other territorial waters. In January 2011, a container ship was boarded in Costa Rica and robbed of the ship’s equipment and stores and escaped without being detected.¹⁹ This type of piracy does not meet the UNCLOS III definition of piracy as it occurs within the territorial jurisdiction of a state.

South American piracy is characterized by highly violent, pre-planned attacks that are used to take crew cash and valuables, navigation equipment from the ship, and cargo

¹⁶ Niels West, *Marine Affairs Dictionary: Terms, Concepts, Laws, Court Cases, and International Conventions and Agreements*, (Westport, CT: Praeger, 2004), 470.

¹⁷ ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Annual Report 1 January – 31 December 2008*, (London: ICC International Maritime Bureau, 2009), 3.

¹⁸ International Maritime Bureau, *Piracy and Armed Robbery Against Ships: A Special Report*, (London: International Chamber of Commerce, 1997), 7-10.

from the hold. It involves collusion by port authorities because heavy equipment is often needed to off-load the cargo. For example, in January 2011, twelve men armed with guns, knives, axes and crowbars boarded a ship at anchorage outside of Lagos Port in Nigeria.²⁰ The crew was badly beaten and severely injured. The pirates escaped after having taken personnel belongings and the ships' cash reserves. While it occurs in territorial waters, ports or at anchorage, the local law enforcement typically does not have the manpower, competency, or political will to prevent or investigate these matters.

Phantom ship piracy occurs solely on the high seas by armed gangs who have pre-planned the attack. The gang will board the ship and either set the crew adrift or throw them overboard. This occurred, for example, in March 2011 on the South China Sea when a tug named the Marina 26 was hijacked en route from Singapore to Cambodia by more than ten pirates who had long knives.²¹ They released the crew with some food, water, and their passports in a life raft after they repainted the tug green and disabled the satellite tracking system. Once the gang has control over the ship, they will rename the ship to match falsified papers and registration and sail to a port with a pre-arranged buyer for the cargo. Once that cargo has been disposed of, the gang will use the fake registry to steal more cargo from unsuspecting shippers.

Military/political attacks are another type of piracy that occurs in any location by armed gangs with some pre-planning. These are considered to be terrorist attacks because the motivation behind these actions are political and not specifically for financial gain. These types of attacks often receive significant law enforcement response. For

¹⁹ International Maritime Bureau, *Reports on Acts of Piracy and Armed Robbery Against Ships: Acts Reported during January 2011*, (London: International Maritime Bureau, February 2011).

²⁰ International Maritime Bureau, February 2011.

purposes of this research project, terrorism is considered to be a violation of international law distinct from piracy.

The high seas attack occurs only on non-territorial seas by armed gangs coming from “mother ships.” The crew is over-powered and the ship is diverted from course. The entire cargo is unloaded over several days to either a safe-haven harbor or onto the mother ship, and then the ship and crew are released after the cargo transfer. In October 2011, the *Halifax*, an oil product tanker, was hijacked off the coast of Nigeria and sailed to an awaiting barge where the ship’s cargo was transferred.²² The twenty-five crew members were taken hostage and eventually released with no injuries. The location, speed, and lack of communication of this kind of attack almost completely prevent any chance of a shore-based response.

The final type of piracy is the ransom attack or Somali piracy. Again, using mother ships, gangs of pirates on speed boats attack the crew on the high seas. The crew is over-powered and then the entire ship is held for ransom from either the shipping company or the flag state. The ship is either kept out at sea or is sailed into a safe harbor. Two examples of this type of piracy occurred in August 2011, when the *Tribal Kat*, a yacht, was hijacked and its crew members taken hostage off the coast of Yemen.²³ Less than a week later, a product tanker, the *Mattheos I*, was hijacked off the coast of Benin and the twenty-three crew members were taken hostage.²⁴ The location of both ships is unknown and the successful payment of ransoms has not been reported.

²¹ International Maritime Bureau, *Reports on Acts of Piracy and Armed Robbery Against Ships: Acts Reported during March 2011*, (London: International Maritime Bureau, April 2011).

²² International Maritime Bureau, *Reports on Acts of Piracy and Armed Robbery Against Ships: Acts Reported during October 2011*, (London: International Maritime Bureau, November 2011).

²³ International Maritime Bureau, *Reports on Acts of Piracy and Armed Robbery Against Ships: Acts Reported during August 2011*, (London: International Maritime Bureau, September 2011).

²⁴ International Maritime Bureau, September 2011.

Modern day piracy resembles old piracy in a number of ways. The motivations for many of the pirates of today are the same as they have been for the last thousand years: freedom, ability to use skills that they have, attempt to escape a miserably living situation, and ability to earn a higher profit than would ever be possible in a legitimate line of work. As one modern pirate from Bantam stated, he got into piracy “partially for the money, but it is fun and adventure, like James Bond.”²⁵ Another similarity is the use of the most modern technology, while still relying on basic seafaring skills. The pirates of yesteryear often had modified ships that were the fastest and most technologically advances on the seas. Today, pirates often have modified ships with advanced weaponry, such as rocket-propelled grenades. These weapons may not be as advanced as the United States Navy, but are definitely more advanced than the weaponry aboard the attacked ships. Both the pirates of today and in the past relied on not just technological advantages, but also on being superior sailors who typically are very well-versed in the waters in which they attack. Often times, pirates of centuries ago would fly false flags to lure in another ship, which is a tactic that has been adopted by modern pirates, who use deceit, such as faking engine trouble or pretending to be a small, local fishing boat to avoid suspicion.

Another similarity is that piracy, no matter the century, depends on lax enforcement on land, thus allowing for safe haven or places to trade and dock. In the past and today, ships need to replenish supplies, repair their ships, and spend their ill-gotten bounty. Safe havens for pirates throughout history have allowed piracy to flourish. While there are no examples of modern day letters of marque or any other legal exceptions provided by states for pirates, the actions of states through either collusion or

²⁵ Peter Gwin, “Dangerous Straits,” *National Geographic*, 112, No. 4, (October 2007), 126-149, 146.

lax enforcement provides the necessary ingredients for successful piracy, such as information on cargos and locations for resupplying.

The underlying causes of piratical acts have not shifted significantly in over a thousand years. While modern day pirates have access to global positioning and rocket propelled grenades, they are still following the same tides that have pushed individuals into piracy for centuries.

INTERNATIONAL LEGAL TEXTBOOK RHETORIC

Developments in international law concerning piracy in the last century give the appearance of being static and well-settled. The perpetuation of norms in the epistemic community is also specific to individual *jus cogens* norms, such as the prohibition against piracy, and can be seen in the discussions contained within international law textbooks. These textbooks pass along information about peremptory norms in general, and the distinct aspects of each norm contained in this overall category. This is an examination of a particular peremptory norm as seen through the lens of the community of international lawyers. The following characteristics of this norm as demonstrated in the rhetoric found throughout textbooks concerning the *jus cogens* nature of the prohibition against piracy.

Prohibition Against Piracy as Jus Cogens

The strength of the prohibition on piracy as a peremptory norm is put forth within international legal textbooks. This is based on both modern law and historical precedent since the prohibition on piracy is a fundamental norm under international law. As previously discussed, piracy has been historical been viewed as a crime that is threatening

to both individuals and states. The status of the prohibition of piracy as a *jus cogens* norm has been well-established and is commonly referenced as a peremptory norm.²⁶

The prohibition on piracy has been declared for centuries and has continued to become ingrained within the legal system. An oft-quoted and referenced case *United States v. Smith* from 1820 is a prime example of the prohibition of piracy as part of “the law of nations.”²⁷ In this case, Justice Story included over twenty pages of footnotes showing that piracy was against the law of nations, including quotations from the likes of Grotius, Bacon and Martens.²⁸ Another example, from 1817, is provided in *International Law in Contemporary Perspective*, from the English case *Le Louis* stating, “With professed pirates there is no state of peace [as] they are enemies of every country, and at all times; and therefore are universally subject to the extreme rights of war.”²⁹ Pirates have even been referred to as individuals who are “committing the original ‘international’ crime against humanity;”³⁰ however, some see the prohibition on piracy developing into part of the law of nations as nothing more than “merely safeguard[ing] a joint interest....of all States to fight a common danger.”³¹ While this does appear to regulate the crime of piracy to a lesser international law standard, the survival of the prohibition and the strong support throughout the international legal community indicates that this prohibition has grown beyond a mere interest safeguard.

Piracy is viewed by the overwhelming majority of the international community of lawyers as an international crime or a “universal crime” that triggers universal

²⁶ Epps, 2009. See also Shaw, 2008 and Aust, 2010.

²⁷ Janis and Noyes, 2006, 139.

²⁸ Mark W. Janis, *The American Tradition of International Law: Great Expectations 1789-1914*, (Oxford: Clarendon Press, 2004), 65.

²⁹ Reisman, Arsanjani, Wiesner and Westerman, 2004, 651.

³⁰ Solmanson, 2007, 196.

³¹ Cassese, 2005, 15.

jurisdiction and criminal liability of individuals.³² Piracy is “the clearest example” of an international crime that places pirates “beyond the pale of protection by any nation.”³³ The rhetoric of the epistemic community is that the prohibition on piracy is a *jus cogens* norm and gives rise to treaty restrictions, extended jurisdiction, and international obligations.

Piracy and Treaty Law

The international law textbooks highlight the reliance on the UNCLOS III to define piracy and provide treaty-based support for the customary international law that has developed over centuries. In some cases, such as Malanczuk’s *Akehurst’s Modern Introduction to International Law*, piracy is referenced only under treaties that provide for the provisions of the international crime, such as the 1982 UNCLOS treaty, but these references still include *jus cogens* elements like universal jurisdiction. In some cases, the shift to UNCLOS III definitions is beneficial in that it expands the motivations for piracy to be more encompassing, as seen in Von Glahn’s explanation of how “acts of piracy may be prompted by feelings of hatred or revenge and not merely by desire for gain” as was the case in customary law, but it is still required to be motivated for private ends.³⁴ In other cases, authors recognize that the definition of piracy under UNCLOS III can also be viewed as more narrow because of the elements required to be classified as a piratical act, such as the location of attack must be on the high seas or cannot be perpetrated by mutineers.³⁵

³² Epps, 2005, 106 and 144.

³³ Bederman, 2010, 76.

³⁴ Von Glahn, 1996, 259.

³⁵ Malcolm D. Evans, “The Law of the Sea,” found in Malcolm D. Evans (ed.), *International Law*, (New York: Oxford University Press, 2003), 623-656.

International law textbooks accept UNCLOS III as the main treaty to determine what rights and obligations individuals and states have in dealing with the international crime of piracy. While the concentration on piracy's definition and limitations due to UNCLOS III are provided, the textbooks also demonstrate how the prohibition against piracy is a peremptory norm in international law with all the obligations that flow from such a designation.³⁶ Within this context, authors also recognize that piracy is an international crime that creates expanded jurisdiction and international obligations for both individuals and states.

Piracy and Jurisdiction

Another constant within the international legal textbooks is the consensus that acts of piracy give rise to universal jurisdiction. Piracy is considered to be the "first international crime warranting universal jurisdiction."³⁷ Universal jurisdiction is more expansive than other forms of jurisdiction that rely upon a tie to the individual who committed the crime or the individual who was the victim of the crime. For example, a state may exercise jurisdiction over an individual who commits a crime within their borders under the principle of territorial jurisdiction. The ability to apply jurisdictional claims over pirates has expanded beyond the need for a link between the prosecuting state and the crime.³⁸ This is based upon the nature of piracy. Vaughan Lowe states that "some crimes are regarded as so serious that all mankind has legitimate interest in repressing them" and that "piracy is the archetypal example."³⁹ Piracy is viewed as *hostis humani generis*, the enemy of all mankind, and is consistently referenced as such

³⁶ Epps, 2009. See also Dixon, McCorquodale, and Williams, 2011, Evans, 2010, and Shaw, 2008.

³⁷ Joyner, 2005, 137.

in international legal textbooks, thus providing a basis for universal jurisdiction.⁴⁰

According to Janis in 2008, universal jurisdiction is best illustrated by the traditional jurisdiction that every state has held over pirates and slave traders.⁴¹

A number of texts highlight how the exclusive nature of the flag state jurisdiction on the high seas is overcome by the universality of jurisdiction over piratical acts. The practical application of this jurisdiction means that “any State is empowered to bring to trial persons accused...regardless of the place of commission of the crime, or the nationality of the author or the victim” which was “first proclaimed in customary international law in the seventeenth century, with regard to piracy.”⁴² Universal jurisdiction also creates an exception “to the exclusivity of the flag state’s jurisdiction” as “all states may exercise jurisdiction over pirate vessels.”⁴³ For some strict positivists, piracy is only a municipal crime and the only influence of international law is on the jurisdictional questions concerning enforcement.⁴⁴ This is not a predominant view in the international law rhetoric which has moved away from being strictly positivist or strictly naturalist in nature.

Overwhelmingly, the rhetoric in the international community of lawyers provides that “it is long been recognized and well-settled that persons and vessels engaged in piratical operations on the high seas are entitled to the protection of no nation and may be punished by any nation that may apprehend or capture them.”⁴⁵ This means that any nation can assert jurisdiction, thus “the set of possible prosecuting nations is extended

³⁸ *United States v. Bin Laden*, 92 F.Supp.2d 189, (S.D.N.Y. 2000).

³⁹ Lowe, 2007, 177.

⁴⁰ McCaffery, 2006, 184. *See also* Carter, Trimble, and Bradley, 654.

⁴¹ Janis, 2008, 335.

⁴² Antonio Cassese, *International Criminal Law*, (New York: Oxford University Press, 2003), 284.

⁴³ Murphy, 2006, 350. *See also* Buergenthal and Murphy, 2011.

⁴⁴ Janis and Noyes, 2006.

beyond that of the perpetrator's State of nationality or the nation where the offense took place."⁴⁶ In other words, the conduct of pirates are "sufficiently heinous to violate the laws of all states" regardless of where the "conduct started [or] completed," thus allowing for prosecution by all states.⁴⁷ In addition to the heinous nature of the piracy, the common interests of states led to the recognition of universal jurisdiction because "pirates usually operated beyond territorial waters with crews of mixed or uncertain nationalities."⁴⁸ The rhetoric of the epistemic community provides that the prohibition on piracy is a peremptory norm, which is limited by UNCLOS III, but has universal jurisdiction and gives rise to obligations under international law.

Piracy, Obligations and Enforcement

International legal textbooks emphasize the obligation of states to use the "power to prosecute and try the accused" or "alternatively to extradite the defendant to a State concerned."⁴⁹ This obligation has been reinforced in the rhetoric of international law through the consistent discussion of UNCLOS III and its requirement in Article 100 that "all states shall co-operate to the fullest extent in the repression of piracy."⁵⁰ These obligations are referred to by some as "obligations *erga omnes*," or obligations that are towards all.⁵¹ These obligations are triggered when an action is "defined as a 'universal crime'" and allow for "all states" to seek redress.⁵² The purpose of allowing for all states

⁴⁵ Damrosch, Henkin, Pugh, Schachter, and Smit, 2001, 1136.

⁴⁶ Bederman, 2010, 190.

⁴⁷ Slomanson, 1995, 199.

⁴⁸ Armstrong, Farrell and Lambert, 2007, 181.

⁴⁹ Cassese, 2005, 451 note 26.

⁵⁰ United Nations Convention on the Law of the Sea (1982) 1146, found in Dmanrosh, Henkin, Pugh, Schachter, and Smit, 2001, 1146.

⁵¹ Scott, 2010, 25.

⁵² Epps, 2010, 115. *See also* Shaw, 2010.

to fulfill their obligations “rested on the joint interest of all States to fight a common danger (and consequent damage)” that “creat[ed] an [sic] universal terror and alarm” because pirates are “enemies of the human race, renouncing every country, and ravaging every country in its coasts and vessels indiscriminately.”⁵³

In addition to the obligation that states have to prosecute pirates, authors, such as Bederman, discuss the mechanics of legal justifications for other enforcement measures, for example, “stop and seizure” of vessels participating in piratical acts.⁵⁴ In *Cases and Materials on International Law*, the authors discuss briefly discuss the practical problems encountered by some states, such as Denmark, on prosecuting and enforcing piracy prohibitions. In the example of Denmark, there is an inability to extradite criminals when they may be subject to the death penalty and a political unwillingness to use a domestic tribunal for fear of immigration complications after the pirates had served their sentences.⁵⁵ Despite these practical problems of prosecution, the discussions provided by international law textbooks clearly indicate that there is an obligation on states to do more than simply recognize the status of piracy in international law, but to also fulfill their duty to punish those who participate in piracy.

In addition to the discussion of obligations, some authors do acknowledge that enforcement has been spotty at best. The acceptance of the prohibition on piracy paints a picture of universal enforcement and this being an issue from the days of sailing ships and pantaloons. Some authors, such as Cassese in 2005 or Von Glahn and Taulbee in 2007, discuss some modern day incidents of piracy, but the severity and frequency of such acts is still downplayed within the textbooks. Another example is Aust, who states

⁵³ *Le Louis, Forest*, 1817 found in Cassese, 2005, 15.

⁵⁴ Bederman, 76.

that piracy “is again a curse in several parts of the world, but concentrates his analysis on the definitional and jurisdictional issues of piracy with a very limited discussion of the increase in piracy in the last decade.”⁵⁶ While these few authors do recognize that there is still a problem with piracy throughout the world, the majority of international law textbooks use piracy as more of a historical examination of an international crime that gives rise to universal jurisdiction than as a current legal problem.

The obligation to prosecute and the ability for states to hold individuals accountable under international law for piratical acts have been well-established in the rhetoric of the epistemic community. The prohibition against piracy is considered to be a historical and modern peremptory norm in international law. The customary law prohibition on piracy has been codified in UNCLOS III and allows for prosecution under the terms of universal jurisdiction. The *jus cogens* nature of this prohibition also creates obligations *erga omnes*. These rhetorical patterns are demonstrated throughout the textbooks used to transfer knowledge to the new members of the international community of lawyers.

Meaning of the Rhetoric

What story does this rhetoric tell? The illegality of piratical acts and the proper state response has been a matter for debate and discussion for as long as there has been piracy. Historically, piracy has been a crime where the perpetrators who were found guilty were hung until their death. However, publicized trials after the Golden Age of piracy are not very common. These historical judicial actions did create the basis for the

⁵⁵ Dixon, McCorquodale and Williams, 2011.

⁵⁶ Aust, 2005. *See also* Aust, 2010.

modern law on pirates, such as in the case of *United States v. Smith*. The modern day laws have different punishments, ranging from life in prison to lesser sentences, depending on the location of the trial and the charges that are specified.

As discussed previously, piracy has become an international crime that falls into the category of *jus cogens*. This status confers universal jurisdiction and obligations to prosecute violations of this norm. This duty is reinforced in UNCLOS III, Article 100, which requires states to cooperate in repressing piracy to the fullest extent possible. These enforcement duties are conferred upon all states equally in the international system. Given the *jus cogens* status of the prohibition against piracy and the strong state obligations to suppress piracy, the international community of states should be prosecuting and punishing pirates, but this is not reality.

CONTEMPORARY REALITY

There are problems with tracking piracy. Unfortunately, one problem with reporting is that all the witnesses might be dead, so an account cannot be provided.⁵⁷ Another problem with adequately identifying the extent of piracy is the lack of reporting by shipping companies, who typically underreport, due to “fear of raising their insurance premiums and prompting protracted, time-consuming investigations.”⁵⁸ A third problem is that such illegal acts sometimes involve collusion by law enforcement or port officials, which would tend to make shippers or victims reluctant to report these crimes to the same individuals supplying the pirates with intelligence and assistance. An example is provided by David Vann, who when his engine was stolen during a trip in Mexico, was

⁵⁷ Martin N. Murphy, *Small Boats, Weak States, Dirty Money: The Challenge of Piracy*, (New York: Columbia University Press, 2008), 68.

told by the port captain that it is a loss could be reported officially or unofficially.

According to Vann, “officially meant he’d have six agencies come strip-search me” but “unofficially meant he would do nothing, even though I could tell him who’d stolen the engine and where it was being kept.”⁵⁹ Also, in many parts of the world, particularly in South East Asia, piracy is considered “a normal but illegal means of making money.”⁶⁰ In addition to regional acceptance, a number of states refuse to admit that they have any piracy within their region because of the possible cooling effects on shipping due to possible delays.⁶¹ Underreporting occurs because many attacks involving coastal fishermen and recreational boaters are not brought to the attention of the authorities.⁶² It has been estimated that as many as seventy-five percent of attacks are not reported worldwide.⁶³

The Piracy Reporting Center (PRC), an arm of the IMB, tracks the incidents of piracy throughout the world. While the figure provided by the PRC is based upon self-reporting, it does provide insight into the extent of piratical acts. Between 2003 and 2011, there were a total of 3,284 attempted and successful piratical attacks around the world.⁶⁴ In 2008, the following states had five or more incidents that were reported: Bangladesh, Ghana, Gulf of Aden, India, Indonesia, Malaysia, Nigeria, Peru, the Philippines, the Singapore Straits, Somalia, Tanzania and Vietnam.⁶⁵ Of the 293 reported actual or attempted attacks in 2008, 200 were successful.⁶⁶ These attacks resulted in a

⁵⁸ Luft and Korin, 2004, 62.

⁵⁹ David Vann, “Last Voyage of the Cúlin,” *Outside Magazine*, October 2008.

⁶⁰ International Maritime Bureau, 1997, 3.

⁶¹ Murphy, 2008, 18.

⁶² Von Glahn and Taulbee, 2007, 362.

⁶³ Michal McNicholas, *Maritime Security: An Introduction*, (Burlington, MA: Elserier, Inc., 2008), 172.

⁶⁴ International Maritime Bureau, *Annual Reports* 2008, 2009, 2010 and 2011.

⁶⁵ International Maritime Bureau, 2009, 8.

⁶⁶ International Maritime Bureau, 2009, 11.

reported 1,011 deaths, kidnappings, or injuries to crew members.⁶⁷ In 2009, a total of 410 piracy attacks that were attempted or successful were reported.⁶⁸ Of these attacks, 202 were successful worldwide, resulting in 1,166 deaths, kidnappings, or injuries to crew members.⁶⁹ In 2010, saw an increase in actual or attempted attacks to total 489 incidents with 276 of these attempts to have been successful which resulted in 1,086 deaths, kidnappings, or injuries.⁷⁰ An increase was recorded in 2011, with 544 actual or attempted attacks, with 270 successful attacks.⁷¹ While only 582 deaths, kidnappings, or injuries occurred in these incidents, the number of deaths rose from 2 to 7 between 2010 and 2011.⁷²

These attacks often include the use of a weapon and the use of these weapons is continuing. From 2003 until 2007, the highest level of guns reported being used during an attack was less than thirty percent.⁷³ In 2008, guns were reported to be used in over forty-seven percent of the attacks.⁷⁴ The escalation continued as over fifty-eight percent of attacks in 2009 reported the use of guns.⁷⁵ In 2010, almost half of the incidents reported weapons being used, including knives and steel pipes.⁷⁶ The use of weapons continued into 2011, with a total of 186 incidents involving weapons.⁷⁷ Many of these violent attacks were not in Somali, but centered on the opposite coast of Africa in the

⁶⁷ International Maritime Bureau, 2009, 13.

⁶⁸ ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Annual Report 1 January – 31 December 2009*, (London: ICC International Maritime Bureau, 2010), 6.

⁶⁹ International Maritime Bureau, 2010, 10 and 12-13.

⁷⁰ International Maritime Bureau, 2011.

⁷¹ International Maritime Bureau, 2012.

⁷² International Maritime Bureau, 2012.

⁷³ International Maritime Bureau, 2009, 13.

⁷⁴ International Maritime Bureau, 2009, 13.

⁷⁵ International Maritime Bureau, 2010, 13-14.

⁷⁶ International Maritime Bureau, 2011.

⁷⁷ International Maritime Bureau, 2012.

waters off of Nigeria where more violent attacks involving guns, knives and other weapons were successful.⁷⁸

According to Peter Chalk, there are seven factors that have created an upswing in pirate attacks.⁷⁹ A number of these factors are not controlled by international or domestic law. The first is continued increase in the amount of maritime traffic. Given that “roughly 80 percent of global freight moves by sea, much of which takes the form of cargo that is transshipped on the basis of just enough, just in time inventory,”⁸⁰ the opportunities available for pirate targets are numerous. Second, a large amount of the commerce has to pass through maritime chokepoints, such as the Malacca Straits and the Singapore Straits. Attempting to avoid these chokepoints will often add significant and possibly cost-prohibitive expenses and time delays, but these congestion areas provide opportunities for the pirate.⁸¹ Third, the global recession and economic gain, when other avenues of earning are cut off, piracy will increase. The fourth factor concerns the general issues of maritime surveillance. The high seas alone cover approximately 2.42 times the planet’s terrestrial surface area with over 139,000,000 square miles, which is a large area to be successfully monitored.⁸² It has been estimated by Admiral Michael Mullen, former chair of the United States Joint Chiefs of Staff, that it would take “1,000 ships to effectively fight piracy, more than the entire U.S. Navy fleet.”⁸³ The final non-

⁷⁸ International Maritime Bureau, 2012.

⁷⁹ Peter Chalk, *The Maritime Dimension of International Security: Terrorism, Piracy, and Challenges for the United States*, (Santa Monica, CA: RAND Corporation, 2008), xi-xii.

⁸⁰ Michael D. Greenberg, Peter Chalk, Henry H. Willis, Ivan Khilko, and David S. Ortiz, *Maritime Terrorism: Risk and Liability*, (Santa Monica, CA: RAND Corporation, 2006), 15.

⁸¹ David Hunt, “The Piracy Hotspots of Tomorrow,” *Reinsurance Magazine*, August 1, 2008, 13.

⁸² Chalk, 2008, 2.

⁸³ David Osler, “Medvedev Calls for International Piracy Court,” *Lloyd’s List*, May 6, 2009, 2.

legal factor is the “global proliferation of small arms [that] has provided pirates with an enhanced means to operate on a more destructive and sophisticated level.”⁸⁴

Some of these factors are controlled by legal factors. The first legal factor is related to the need for fighting piracy on land. This factor is the lack of competent and sufficient security in port areas affects the level of piracy. In areas where a “combination of laziness, inefficiency, and corruption in port areas” exists, pirates “must surely feel a reasonable high degree of safety and security in their chosen means of commercial endeavor.”⁸⁵ The final factor, which is discussed more in more depth below, is corruption and official collusion. This factor is directly related to the failing on the part of states to uphold their obligations under the prohibition of piracy.

Somali Piracy: A Well-Publicized but Not Unique Case

Since Somali piracy is one of the profitable and most published cases of piracy since the Golden Age of Piracy, it is examined in more depth than other piratical hot spots around the world, such as West Africa and the South China Sea. The intensity and extremism of piracy in Somalia has overshadowed many of the other troubled areas in the world. The purpose of this section is to address the problem of Somali piracy, but is not intended to limit the scope of this study by excluding the hundreds of other instances of piracy throughout the world. While Somalia has been dominating the piracy conversation for a number of years, it is not the only area of piracy. It does need a more extensive examination due to the increased international response to this region.

⁸⁴ Chalk, 2008, xii.

⁸⁵ Jack A. Gottschalk and Brian P. Flanagan, *Jolly Roger with an Uzi: The Rise and Threat of Modern Piracy*, (Annapolis, MD: Naval Institute Press, 2000), 62.

As of December 31, 2008, a total of 815 crew members had been taken hostage for ransom in Somalia.⁸⁶ Since the beginning of the counter-piracy missions that started in December of 2008, a total of 2,317 seafarers have been held.⁸⁷ As of December 1, 2011, a total of 200 crew members were being held hostage.⁸⁸ In a state with a per capita GDP of \$600, ransom payments have been estimated to total more than \$410 million in the last few years, creating a lucrative industry that employs a large number of the Somali population.⁸⁹ There is even specialization within the industry. “Ex-fisherman, are considered the brains of the operation because they know the sea; ex-militiamen, who are considered the muscle... and the technical experts, who are the computer geeks and know how to operate the hi-tech equipment,” make up the average pirate gang.⁹⁰ This ransom money is purchasing power and recognition, in addition to houses and cars, and turning these pirates into “folk heroes.”⁹¹ The President of Puntland in Somalia, Amdirahman Mohamed Farole, joked “that every young Somali boy now wants to be a pirate and every young girl wants to marry one.”⁹² As their confidence grows, the Somali pirates’ “opening demands had jumped from a range of \$2.5m-\$6m” in 2008, “to absolutely astronomical numbers, ranging from \$5m to \$15m” in 2009.⁹³ In addition to becoming more brazen, Somali pirates have become more sophisticated, as explained by Rear Admiral Jones, “that the mother ships share information about ships sighted or to be

⁸⁶ International Maritime Bureau, 2009, 22.

⁸⁷ “Merchant Ship Crews Held Hostage in Somalia,” December 20, 2011 found at <http://www.eunavfor.eu/2011/12/merchant-ship-crews-held-hostage-in-somalia/>.

⁸⁸ “Merchant Ship Crews Held Hostage in Somalia,” 2011.

⁸⁹ Max Boot, “Pirates, Then and Now: How Piracy was Defeated in the Past and Can be Again,” *Foreign Affairs*, (July/August 2009), 94-107, 94-95.

⁹⁰ Robyn Hunter, “Somali Pirates Living the Higher Life,” *BBC News*, April 19, 2009.

⁹¹ *Lloyd's List*, “Piracy Must be Defeated in Courts and Banks, Not Just at Sea,” February 5, 2009, 4.

⁹² Steve Bloomfield, “A Politician on Pirate Turf,” *Newsweek*, May 4, 2009, 8.

⁹³ *Lloyd's List*, “Ransom Demands Soaring to Astronomical Levels,” June 11, 2009, 16.

attacked.”⁹⁴ While the level of sophistication is increasing on one end of Somali piracy, at the other end, according to a former captain in Somalia’s long defunct navy, Abdullahi Omar Qawdan, “All you need is three guys and a little boat, and the next day you’re millionaires.”⁹⁵

The Security Council of the United Nations has attempted to address the problem of piracy by passing five separate resolutions in 2008. Despite the signing of the December 2008 memorandum between Britain and Kenya that creates a formal relationship for the trials of captured pirates, the “dominant approach has been to avoid capturing pirates in the first place, or, if captured, releasing the pirates without charging them with a crime.”⁹⁶ In 2009, Australia, Canada, China, Denmark, France, Germany, Greece, India, Iran, Italy, Japan, South Korea, The Netherlands, Pakistan, Portugal, Saudi Arabia, Russia, Singapore, Spain, Sweden, Turkey, the United Kingdom and the United States all deployed naval forces to the Gulf of Aden. Nevertheless, approximately \$200-350 million will be needed to sustain naval vessels in the region annually and the effectiveness can legitimately be questioned.⁹⁷ Despite these developments, Kenyan courts lack the resources to do more than have a handful of convictions and most states, including the Netherlands, Russia, and the United States, have simply released captured pirates.⁹⁸ In other words, as stated by Rear Admiral William Baumgartner of the United States Coast Guard, “Somali pirates to date have suffered few consequences, even when

⁹⁴ Nicolas Gros-Verheyde, “Pirates Becoming Better Organized,” *Europolitics*, May 28, 2009.

⁹⁵ *The Week*, “Somalia: A State of Failure,” May 22, 2009, 11.

⁹⁶ Eugene Kontrorovich, “International Legal Responses to Piracy Off the Coast of Somalia,” *American Society of International Law*, 13, No. 2 (2009): <http://www.asil.org.insights090206.cfm>.

⁹⁷ Raymond Gilpin, “Counting the Costs of Somali Piracy,” *United States Institute of Peace Working Paper*, June 22, 2009.

⁹⁸ Boot, 2009, 106.

they were apprehended.”⁹⁹ In 2010, the North Atlantic Treaty Organization (NATO) extended its counter piracy mission to the end of 2012, as the current mandate was set to expire at the end of August 2010.¹⁰⁰

Recently, the international response against piracy has further weakened. NATO’s mission only has a limited number of warships from Britain, the United States, Italy, Turkey, and Greece, which, while the mandate has been extended, is not necessarily sufficient to make a significant difference in the number of attacks in the Gulf of Aden, especially as the Somali pirates are expanding their area of operation. Somali pirates are now hijacking boats more than 1,200 miles from the Somali coast, which is closer to India than Somalia.¹⁰¹

The Kenyan government has stated that it will no longer accept suspected pirates for prosecution despite the 2008 memorandum with the British government. An agreement between the Netherlands and Kenya was also recently suspended by the Kenyan government. Agreements that the Kenyan government had signed with the European Union, the United States, Canada and China are also expected to be cancelled very shortly. The Seychelles have agreed to take suspected pirates in an agreement with the European Union, but the pirates are required to serve their sentences in other states, thus providing a forum, but not necessarily the ability to punish the violators. Despite the existence of a forum to try pirates, pirates are still being set free. In March 2010, six pirates were placed in a skiff with fuel and water to reach shore after a gun battle and a

⁹⁹ Boot, 2009, 107.

¹⁰⁰ International Maritime Bureau, April 2010, 29.

¹⁰¹ Jeffrey Gettleman, “Somali Pirates Hijack Vessels 1,200 Miles Offshore,” *The New York Times*, April 20, 2010.

chase on the high seas.¹⁰² This is a common occurrence. In May 2010, the Russian navy, after a 22-minute firefight, placed the captured pirates on their own ship and sent them home.¹⁰³ The lack of enforcement of international law can be summed up by General Mikolai Y. Makarov, the chief of Russia's general staff, when he stated, "It is much easier to catch pirates than to decide what to do with them."¹⁰⁴

The response to the problem of Somali piracy which appears to be having limited success, but given the increased range of many Somali pirates, this may be skewed. While the number of the attacks has increased, the success rate of the pirates has diminished. In 2010, 172 vessels were attacked with a success ratio of twenty-nine percent or fifty completed hijacks.¹⁰⁵ The success ratio of Somali pirates dropped to 11.5 percent with only thirty-three successful hijackings of the 286 attacks.¹⁰⁶ Overall, the amount of attention in the world-wide media to this particular area has taken focus away from other areas of piracy that have significantly increased over the last two years showing that piracy is not a problem contained off the coast of Somalia, thus not a unique case.

Further Piracy Concerns Beyond Somalia

Other areas have caused concern in the international shipping community as piracy increases. In Peru, while vessel seizures for ransom are not an issue, the kidnapping of target personnel in the shipping industry from vessels is of increasing

¹⁰² Alan Cowell, "Pirate Suspects are Released by Naval Force," *The New York Times*, March 25, 2010.

¹⁰³ Ellen Barry, "Russia Frees Somali Pirates it had Seized in Shootout," *The New York Times*, May 7, 2010.

¹⁰⁴ Barry, 2010.

¹⁰⁵ International Maritime Bureau, 2012.

¹⁰⁶ International Maritime Bureau, 2012.

concern.¹⁰⁷ It has been noted that “piracy incidents off Nigeria were increasingly very violent and incidents where seafarers are injured or killed were not very common,” despite a significant under-reporting of incidents to the IMB.¹⁰⁸ Also on the Western coast of Africa, one of the world’s most lawless stretches is the Gulf of Guinea.¹⁰⁹ While patrols of NATO ships have been continuing in the Gulf of Aden, off the coast of Somalia, pirates have simply moved their focus to areas where no patrols exist, the southern and eastern coasts.¹¹⁰ These concerns have spread throughout the Indian Ocean and recently caused an unprecedented loading and shipping of racing yachts on armed ships to avoid possible pirate attacks.¹¹¹ The number of incidents in the South China Sea was reported at seventy-seven in 2009, 134 in 2010, and 113 in 2011, thus being a significant contributor to piracy in the world.¹¹²

On a brighter note, one of the rare cases of piracy in European waters recently resulted in a Moscow Court handing down a five-year sentence to an Estonian man, who plead guilty to hijacking a cargo ship off the coast of Sweden in August 2010.¹¹³ This prosecution is unusual. The story of the *Felicity*, a yacht sailing off the coast of Madagascar is a more common occurrence of the prosecutions of pirates.¹¹⁴ While the yacht was sailing in international waters, seven pirates with AK-47s boarded her from a speed boat. After taking all the personal belongings of the crew and passengers, two more pirates in a skiff met the *Felicity*. At this point, all crew and passengers, except the

¹⁰⁷ *Lloyd's List*, “Peru Crimewave Spreads to Ocean as Pirate Attacks Rise,” March 13, 2009, 12.

¹⁰⁸ Marcus Hand, “Nigeria Pirate Attacks Going Unreported, Warns IMB,” *Lloyd's List*, May 28, 2009, 16.

¹⁰⁹ *The Economist*, “A Clear and Present Danger,” April 18, 2009, 52.

¹¹⁰ Mark, McDonald, “Record Number of Somali Pirate Attacks in 2009,” *The New York Times*, December 30, 2009.

¹¹¹ *The Virginian Pilot*, “Sailing: Racing Yachts Hide from Pirates,” December 29, 2011.

¹¹² International Maritime Bureau, 2010, 2011 and 2012.

¹¹³ Michael Schwirtz, “Russia: Sentence in Ship Hijacking,” *The New York Times*, May 7, 2010.

¹¹⁴ International Maritime Bureau, April 2011.

Master, were locked in the bottom of the yacht. The pirates ordered the Master, after threatening to kill him and three women on board to navigate towards Tanzania, while attacking all vessels they came across. Eventually the Felicity ran out of fuel and supplies. The pirates continued to sail towards Mozambique after leaving the Felicity where they were arrested for attacking multiple ships in the sixteen day ordeal. The pirates were then released and not prosecuted.

Individual states also prevent international or regional enforcement through collusion or complicated and unnecessary procedures or fees. Indonesia is notorious for “complicity of government officials and members of the security forces who participate in, arrange, or otherwise facilitate low-and high-end attacks.”¹¹⁵ In January 2006, an Indonesian soldier was arrested during a piracy attack while kidnapping two crew members.¹¹⁶ It was a confirmation of long-held suspicions of the shipping community that “Chinese and Indonesian military have assisted or participated in piracy in Southeast Asia.”¹¹⁷ Often pirates obtain information about shipping routes and cargos from local port officials to allow for better planning and coordination of attacks. In the case of the phantom ship type of piracy, Consulates of Panama, Honduras, Belize and St. Vincent are known for taking a higher fee and registering these phantom ships.¹¹⁸ A specific case, the MV ANNA SIERRA is illustrative of a state frustrating the process of a successful enforcement against piracy.¹¹⁹ The ship was highjacked in South East Asia and luckily found intact with the pirates still on board by the Chinese authorities. The pirates were repatriated to a variety of states after a brief stay in a Chinese hotel without any legal

¹¹⁵ Chalk, 2008, 16-17.

¹¹⁶ McNicholas, 2008, 166.

¹¹⁷ McNicholas, 2008, 166.

¹¹⁸ International Maritime Bureau, 1997, 25.

consequences. A bill was sent to the cargo owners and the ship owners for law enforcement activities, docking fees, processing fees, and cargo storage fees. A local official attempted to co-opt the cargo for resale with no consequences. Eventually the ship was left to rot and the cargo left to spoil because of the actions of the Chinese government. While this case is an extreme example of what can happen, the lack of cooperation by local authorities and in some cases outright collusion by officials frustrates the ability to combat piracy.

State collusion and failing to prosecute pirates manifest for a variety of reasons. State collusion often occurs because of corruption by individuals in positions of power, such as government officials who administer ports. This corruption allows for pirates to take advantage of favorable conditions and is currently leading towards ascendancy in West African piracy.¹²⁰

Failing to prosecute pirates occurs for a number of reasons. In some cases, the facilities, infrastructure, or resources to prosecute do not exist or are inadequate. In September of last year, Seychelles President, James Michel, stated that “with thousands of pirates in operation, however, it is clear that there is not enough prison capacity in this region to deal with this problem.”¹²¹ In other cases, it is a lack of evidence or properly obtained and maintained evidence that prevents prosecution. A witness statement from an affected seafarer is required for prosecution of a suspected pirate.¹²² Often states fail to prosecute because issues that would be raised in the domestic setting. For example,

¹¹⁹ International Maritime Bureau, 1997, 33-39.

¹²⁰ Steve Phelps, “Safety at Sea International,” October 2011 found at International Maritime Organization, *Current Awareness Bulletin*, September 2011, Vol. XXIII, no. 9.

¹²¹ Global Travel Industry News, “President of Seychelles Calls for Intensified Efforts Against Piracy,” September 7, 2011 found at <http://www.eturbonews.com/25062/president-seychelles-calls-intensified-efforts-against-piracy>.

“the British Foreign Office reportedly warned the Royal Navy against detaining pirates since this might violate their human rights and could lead to claims of asylum in Britain.”¹²³

Overall, modern day piracy remains a significant problem in the world. The economic and security costs aside, the human toll is significant for seafarers. Despite a few positive developments, such as the recent conviction in Russia and charges brought in the United States against eleven men who attacked to United States Navy vessels, the majority of piracy is going unpunished, often because of claims of a lack of legal ability to prosecute these individuals. The lack of prosecutions, despite the continued rise in piratical acts highlights the gap between the international legal principles and the situation on the ground.

RHETORIC/REALITY GAP

The existence of a gap between the rhetoric of piracy in the international legal community and reality is evident in “the popular perception that the international community has eliminated sea piracy,” which contradicts with the fact that “not only has piracy never been eradicated, but the number of pirate attacks on ships has also tripled in the past decade.”¹²⁴ The recent increase and publicized Somali pirates definitely challenged this notion of piracy being a problem of the past. Unfortunately, given the current reality of the international law to prosecute pirates, the elimination of piracy as an international problem is not likely to come to fruition anytime soon.

¹²² International Maritime Bureau, *Piracy and Armed Robbery Against Ships in Waters Off the Coast of Somalia*, September 2011.

¹²³ Dixon, McCorquodale and Williams, 2011, 384.

¹²⁴ Gal Luft and Anne Korin, “Terrorism Goes to Sea,” *Foreign Affairs* 83, no. 6, (November/December 2004), 61-71, 61.

According to the community of international lawyers, there is a clear path for prosecution and enforcement contained within current treaty and customary international law. Any state, even one without a connection to the pirates or the victims, can claim jurisdiction and prosecute these individuals. This course of action is allowed under the *jus cogens* nature of piracy, the treaty codification of piracy issues in UNCLOS III, the applicability of universal jurisdiction, and the obligations of states assigned to peremptory norms, especially norms that are international crimes. According to the rhetoric provided by the epistemic community, the universal crime of piracy should be diminishing under the current international legal system.

Despite the rhetoric of the international community of lawyers, the reality of the situation can be summed up by looking at recent statements by a leading United States military official. “Admiral Michael Mullen, former chairman of the Joint Chiefs of Staff, said “[o]ne of the challenges that you have in piracy, clearly, is if you are intervening and you capture pirates, is there a path to prosecute them?”¹²⁵ This lack of understanding of the nature of piracy as a peremptory norm shows that a gap exists between the rhetoric of the international legal community and the reality as perpetrated by state actors. This inconsistency between these two sources of the international law, the practice of states and the teachings of publicists, highlights a significant issue within the international legal system.

In regards to the first part of the rhetoric discussed in this chapter, this gap focuses on the declaration of a norm falling into a category of *jus cogens* is recognized, but that does not mean that there will be a practical application of the rhetoric. The

¹²⁵ Thom Shanker, “U.S. Urges Merchant Ships to Try Steps to Foil Pirates,” *The New York Times*, November 20, 2008.

history of piracy being illegal under the law of nations goes back for centuries, but the understanding of that acceptance by all states does not translate into a practical application of the duties that rhetorically flow from a *jus cogens* norm. The well-established and broad acceptance of piracy as a peremptory norm is seen throughout the international legal community, yet, it does not translate to the individuals who are on the front lines of the piracy fight.

The Gap Contained in Treaties and Definitions

The international legal textbooks review UNCLOS III as being the treaty base for the definition of piracy, but this also does not conform to the reality of the situation of piracy. Not all pirate attacks occur on the high seas. Nevertheless, a number of violent attacks and robberies occur when ships are at anchorage or in port. The United Nations agency, the IMB, does not even use the same definition as UNCLOS III and includes attacks that occur at berthing, anchorage, or territorial straits. The reason for this inclusionary definition is that an invisible line in the ocean will not make a difference to the seafarer who has just been kidnapped or killed. Leaving behind the issues of territory in the UNCLOS III piracy definition, in the case of Somalia, the territorial seas are enterable “for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy.”¹²⁶ Given this latitude under the more restrictive UNCLOS III provisions, the number of prosecutions of Somali pirates is still relatively low.

¹²⁶ United Nations Security Council, *Resolution 1816*, June 2, 2008.

The Gap of Universal Jurisdiction

The nature of universal jurisdiction stemming from peremptory norms allows states the opportunity to prosecute those individuals who are participating in piratical activity. By overcoming issues of jurisdiction through the nature of peremptory norms, states have little legal obstacles in their path to prosecution. Despite the clear rhetorical availability of any jurisdiction in the world, states are still not prosecuting violators of the prohibition on piracy. The main purpose of universal jurisdiction is to allow states to pursue interests that serve the world as a whole. Since pirates are considered not only to be enemies of all mankind, but also cause significant problems that are shared by a number of states, such as increased shipping costs and death or injury to seafarers from a plethora of different jurisdictions, the application of universal jurisdiction is proper even if not being used by states.

The Gap of the Duties and Obligations of States

A duty placed upon states to enforce the provisions of international law concerning piracy is the final rhetorical theme. “While every state has the right to arrest pirates on the high seas and arraign them under its own domestic laws, few do.”¹²⁷ The lack of prosecutions and the continued freeing of violators of international law, despite the legal availability of a remedy and the lack of jurisdictional issues, demonstrates a shirking of the enforcement obligations and duties that flow from *jus cogens*. At a bare minimum, the fact that states are not prosecuting is a violation of their duty under international law according to the rhetoric of peremptory norms. The violations of

international law by states are even higher when it is not just a failure to prosecute but when it is state or state actor collusion, which has been observed in a number of states. This state collusion is significant in that highlights extent of the schism that has developed between the rhetoric of international law and the practice of state actors. If states are participating in the violations of peremptory norms by colluding with pirates or providing a safe haven, then the possibility of state actors dismissing lesser principles of international law is significant.

CONCLUSION

The examination above provides evidence that a significant gap exists between the rhetoric of international law as advanced by the international legal community and the reality of state action in the international legal system. This gap has been demonstrated through an investigation of the values and concepts being disseminated and taught to the next generation of the community of international lawyers concerning piracy as a peremptory norm as compared to the actions taken against piratical acts throughout the world. The existing disconnection between the system perpetrators and educators of the international legal system, the epistemic community, and the actions of international actors is evident and leads to further examination. This gap raises the question of what this means for the future of the international legal system if one of the oldest and most established *jus cogens* prohibitions is not fulfilled? The implications of this gap will be detailed in Chapter VI below.

¹²⁷ Martin N. Murphy, *Contemporary Piracy and Maritime Terrorism: The Threat to International Security*, Adelphi Paper 338, (New York: Routledge, 2007), 16.

These issues are not limited to the prohibition against piracy. The following chapter examines slavery as another example of a strong rhetorical support of a norm that is not consistent with the reality of practice in the international system.

CHAPTER V

SLAVERY AND REALITY

The following focuses on slavery, which is the second traditional peremptory norm that demonstrates the gap that exists between the rhetoric of the international community of lawyers and the reality of state practice. Slavery is a prohibition in international law that has been debated for nearly three centuries. The prohibition is considered a *jus cogens* norm and is viewed as a well-established and settled part of international law. Often slavery is thought of as an institution of the past where “negroes” were sold on the open market, especially in the United States.¹ However, it has a long history that includes many societies and their nation states. Since slavery is one of the longest standing prohibitions international law, the gap between the rhetoric of the epistemic community and the reality of those still suffering in bondage and servitude is troubling for the international legal system.

As with the prohibition against piracy, the ban on slavery is part of the core of *jus cogens*. The review of the rhetoric and reality concerning the application of this norm is important to determining the state of the international legal system with regard to peremptory norms. As previously determined, *jus cogens* is a crucial case in understating the international legal system. The prohibition against slavery, like the prohibition against piracy, it is unique in the international legal system and it provides definite evidence of the state of affairs concerning *jus cogens*. By using the prohibition against

¹ Ivan E. McDougale, “The Development of Slavery,” *The Journal of Negro History* 3, no. 3 (July 1918), 214-239.

slavery, as it is one of the most well-established tenets of peremptory norms, insight is garnered concerning *jus cogens* and the international legal system.

This chapter continues the analysis of the inconsistency in the Article 38 of the *Statute of the International Court of Justice* sources of international law. Again, this is not an argument that the modern persistence of slavery, or piracy, creates a situation where the laws have been invalidated. On the contrary, this shows how these laws are considered to be both mature and settled, but current state practice does not fulfill the obligations required under these norms. Since state practice is one of the sources of international law, the lack of consistency between the rhetoric of the community of international lawyers and the reality of the actions of states is significant.

The following also mirrors the examination on the prohibition against piracy. The chapter reviews what constitutes slavery, analyzes the rhetoric on slavery developed by the international legal community in textbooks, and discusses the modern reality of slavery. As in the case of piracy, the gap between the rhetoric of the legal community concerning slavery and the reality of the actual practice will be discussed.

WHAT IS SLAVERY?

One of the earliest known discussions of slavery as concept occurred ancient times, when Aristotle in “The Politics” examined the differences between slaves and freeman in political life and nature.² The acceptance of slavery continued through the Age of Enlightenment as seen the writings of Montesquieu who viewed servitude as a

² Aristotle, “The Politics” in Chris Brown, Terry Nardin, and Nicholas Rengger (eds.), *International Relations in Political Thought: Texts from the Ancient Greeks to the First World War*, (New York, NY: Cambridge University Press, 2002), 61-82.

right if it would preserve a conquest.³ Slavery was widespread and all-encompassing until at least the early seventeenth century, when there was a shift to being based more upon race, and in some cases, class differences.⁴ This shift in the slave trade was “based on a lucrative triangular trade transporting goods from Europe to Africa, African slaves, mostly sold by Arab dealers, to the plantations in America, and finally products and raw materials from America to Europe.”⁵

The middle ages saw a significant rise in the capture of individuals from the coast in Spain by the Barbary corsairs for use as slaves in North Africa. This time period gave rise to a practice known as redemption or ransoming. Redemption is the payment of funds to the owners of the slaves for their release. The name of redemption comes from the beginning of this practice in medieval Spain when “a succession of popes had declared the giving of alms for the rescue of Christians in Muslim lands,” thus redeeming their souls.⁶ The redemption movement was championed by both the Catholic Church and by the Spanish government. While some individuals who were ransomed returned to their lives without significant issues, a number of former slaves did not have anything to return to, thus becoming beggars.⁷

Since slavery was a legally protected practice for centuries, the movement to outlaw slavery was an uphill battle. The establishment of a number of international non-governmental organizations and private groups who pushed for change throughout the

³ Montesquieu, “The Spirit of the Laws,” in Chris Brown, Terry Nardin, and Nicholas Rengger (eds.), *International Relations in Political Thought: Texts from the Ancient Greeks to the First World War*, (New York, NY: Cambridge University Press, 2002), 399-406, 403.

⁴ William Renwick Riddell, “Observations on Slavery and Pirvateering,” *The Journal of Negro History* 15, no. 3 (July 1930), 337-371.

⁵ Malanczuk, 21.

⁶ Ellen G. Friedman, *Spanish Captives in North Africa in the Early Modern Age*, (Madison, WI: The University of Wisconsin Press, 1983), 126.

⁷ Friedman, 164.

international community eventually changed the perception of slavery.⁸ As early as the mid-1700s, “the movement for the abolition of slavery and the slave trade began – on moral grounds – to gain influence within the society of states.”⁹ The coordination of the movement eventually started to influence governmental deliberations and allowed for states to discuss the legal status of the slave trade and slavery.

The legal status of slavery was hotly debated during the beginning of the nineteenth century which led to a split in the legal status of slavery and the slave trade.¹⁰ While domestic slavery was still allowed, the slave trade was first internationally condemned in a treaty between France and England in 1814 and subsequently adopted at the Vienna Congress of 1815.¹¹ England was one of the states advancing the cause to ban slavery by outlawing the slave trade in 1807, and abolishing slavery in 1833.¹² England was at the forefront of the fight of abolition throughout the 19th Century, in large part due to the strong presence of non-governmental organizations who opposed the practice.

The next major development in the movement to abolish slavery was the 1841 Quintuple Treaty of London that “bound the governments concerned to prohibit to their subjects not only the slave-trade but also the investment of slavery.”¹³ Despite these treaties and the push by England to outlaw slavery, the outlawing of the slave trade did not eliminate slavery. For example, French vessels had to follow regulations that determined if a passenger was bona fide by carrying a linen bracelet that had been

⁸ Ian Clark, *International Legitimacy and World Society* (New York, NY: Oxford University Press, 2007).

⁹ Hannikainen, 76.

¹⁰ Mark Weston Janis, *The American Tradition of International Law: Great Expectations 1789-1914*, (Oxford: Clarendon Press, 2004), 69-72.

¹¹ Malanczuk, 21.

¹² Janis, 2004, 134.

stamped by the consular; however, slavers simply sent crew members posing as passengers to fraudulently obtain the necessary papers, which were passed on to the slaves to ensure entry into customs.¹⁴

The international community continued to fight against the slave trade with the Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunition, and Spirituous Liquors, also known as the Brussels Conference Act of 1890. This convention was meant to “attack the evil on land as well as at sea,” was agreed upon.¹⁵ There is a question as to the motivations of the states to use this opportunity to declare the slave trade abolished. It has been suggested that the “real reason...was prompted by a shortage of workforce on the Western Coast of Africa, depopulated by the three-centuries-long export trade of slave labor to North and South America.”¹⁶ This Act was “ratified by all European states, the United States, Persia, Turkey, the Congo and Zanzibar and provided effective military and legal measures to terminate the slave trade.”¹⁷ While this Act did “recognize the legality of certain forms of slavery,” it provided that “the signatories enact legislation against the slave-trade and slave-hunting.”¹⁸

In some limited instances, the slave trade has been viewed as a type of piracy and prosecuted or referenced as such in treaties. One example is an 1820 treaty between the Qawāsim sultanate and Great Britain. In article 9 of this treaty is stated, “the carrying off

¹³ Hugo Fischer, “The Suppression of Slavery in International Law: II,” *The International Law Quarterly* 3, no. 4 (October 1950), 503-522, 511.

¹⁴ Suzanne Miers, *Britain and the Ending of the Slave Trade*, (New York, NY: Africana Publishing Company, 1975), 248.

¹⁵ T.J. Lawrence, *The Principles of International Law*, (Littleton, CO: Fred B. Rothman & Co., 1895), 216.

¹⁶ Slomanson, 62.

¹⁷ Malanczuk, 21.

¹⁸ Hugo Fischer, “The Suppression of Slavery in International Law I,” *The International Law Quarterly* 3, no. 1 (January 1950), 28-51, 50-51.

of slaves, men, women, or children from the coasts of Africa or elsewhere, and the transporting them in vessels, is plunder and piracy, and the friendly Arabs shall do nothing of this nature.”¹⁹ Another example is during the early 1800s when John Quincy Adams, as the United States Secretary of State, negotiated a treaty with Great Britain to declare slavery as piracy. Adams stated that “by the simple expedient of declaring the slave trade piracy, it would become perfectly consistent for the United States to grant a right of search for slave trading pirates,” since “a right to search for pirates was already well established in international law.”²⁰ Eventually, the right to search ships on the high seas was established between the United States and Great Britain without declaring the slave trade a type of piracy.

The United States played a vital role in the slave trade during the 1800s, as demonstrated by the willingness of the state to condemn portions of the practice, such as “the overseas trade to America and the West Indies.”²¹ On the other hand, this condemnation was accompanied by a continued demand for slaves since only slave trading through international means was considered illegal, resulting in the smuggling of individuals from Africa.²² Eventually, after the American Civil War of the 1860s, which resulted in the Emancipation Proclamation issued by Abraham Lincoln and the passage of the 13th Amendment to the United States Constitution in 1865, was slavery outlawed in

¹⁹ Sulān Muhammad Al-Qāsimī, *The Myth of Arab Piracy in the Gulf*, (Dover, NH: Croom Helm, 1986), 227.

²⁰ Hugh G. Soulsby, *The Right to Search and the Slave Trade in Anglo-American Relations: 1814-1862*, (Baltimore, MD: The Johns Hopkins Press, 1933), 9.

²¹ Lord Lugard, “Slavery in All its Forms,” *Africa: Journal of the International Institute of African Languages and Cultures*, 6, no. 1 (January 1933), 1-14, 1.

²² Lugard, 1-2.

the United States.²³ Despite these declarations of freedom for slaves and prohibition on slavery, slavery was still an issue and, as seen below, continues today.

Ultimately the split between the slave trade and slavery was weakened during the period between World War I and World War II when the international community intensified its commitment to banning the institution of slavery and the slave trade.²⁴ The Convention to Suppress the Slave Trade and Slavery of 1926 was the result of this intensification. For the first time in international law, slavery and the slave trade was defined.²⁵ Article 1 of this Convention defined slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”²⁶ This article also defines the slave trade as “all acts involved In the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with the view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.”²⁷ This treaty required states to suppress the slave trade in all its forms and “to bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms.”²⁸ This did not have the desired effect of eliminating both slavery and the slave trade. For example, in China, “the transfer of slaves by written deed from one owner to another has been tolerated by

²³ United States of America Constitution, Amendment 13 found at http://www.archives.gov/exhibits/charters/constitution_amendments_11-27.html. See also National Archives and Records Administration, “The Emancipation Proclamation,” *Featured Documents* found at http://www.archives.gov/exhibits/featured_documents/emancipation_proclamation/.

²⁴ Cassese, 2001, 34.

²⁵ Fischer, 511.

²⁶ Slavery Convention of the League of Nations (1926) found in *Universal Instruments*, Vol. 1 of *Human Rights: A Compilation of International Instruments* (New York, NY: United Nations, 1994).

²⁷ Slavery Convention of the League of Nations (1926).

²⁸ Slavery Convention of the League of Nations (1926).

Chinese law” well into the twentieth century.²⁹ In addition, throughout other parts of Asia, Africa, and the Middle East, domestic slavery was still supported in both law and other societal pressures.³⁰

In 1956, this treaty was expanded and updated through a document called the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.³¹ This Convention expanded the definitions of slavery to include debt bondage, serfdom, marital bondage, and child labor, in addition to the previously accepted definitions of slavery from the 1926 Convention. The 1956 Convention also expanded the definition of the slave trade to include provisions requiring states to secure their ports, coasts and airfields. While this treaty did not achieve as much as the sponsors had hoped, it did provide understanding as to the practices that qualified as slavery and slave-like practices.³² Finally, this Convention also requires states to cooperate with each other to suppress the slave trade and to abolish slavery in all its forms.

Forms of Slavery

There are a number of different forms of slavery and slave-like practices. The most commonly recognized form is chattel slavery, which has been the type of slavery that most laws and international agreements focused upon until the middle of the twentieth century. Chattel slavery is the legal state of a slave in which he “could be sold, given away or inherited, and his services could be pledged or hired out – all without his

²⁹ E.T. Williams, “The Abolition of Slavery in the Chinese Empire,” *The American Journal of International Law* 4, no.4 (Oct., 1910), 794-805, 800.

³⁰ Bales, 2004, 14, 88, 109, and 123.

³¹ Von Glahn and Taulbee, 487.

consent” because “he was an inferior, whose life was considered less valuable than that of a free man.”³³ The offspring of these individuals were also slaves, with the same legal status as their parents.³⁴ This is the form of slavery that was the basis of the transatlantic slave trade. Chattel slaves have also been used as a form of currency that can serve their master until they are ready to be used for purchases.³⁵

Serfdom is another form of slavery. Serfdom is when “a person is bound to a piece of land owned by another person, is bound to render service to that owner and is not free to change his status.”³⁶ The individual who owns the land can sell the serf with the land if he or she chooses. In addition, the serf does not have the ability to end his or her status as a serf. This type of slavery is not found today as this slavery institution has been replaced with debt bondage.³⁷

Debt bondage is also slavery. Debt bondage is defined in Article I of the 1956 Convention as “the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt to the length and nature of those services are not respectively limited and defined.”³⁸ Two of the oldest forms of debt bondage are pawning and peonage.³⁹ The African tradition of

³² Joyce A.C. Gutteridge, “Supplementary Slavery Convention, 1956,” *The International and Comparative Law Quarterly* 6, no. 3 (July 1957), 449-471, 469.

³³ Miers, 59.

³⁴ William D. Phillips, *Slavery from Roman Times to the Early Transatlantic Trade*, (Minneapolis, MN: University of Minnesota Press, 1985), 23.

³⁵ John Grace, *Domestic Slavery in West Africa: With Particular Reference to the Sierra Leone Protectorate, 1896-1927*, (New York, NY: Barnes and Noble Books, 1975), 13.

³⁶ Hannikainen, 450.

³⁷ Hannikainen, 450.

³⁸ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956) in *Universal Instruments*, Vol. 1 of *Human Rights: A Compilation of International Instruments* (New York, NY: United Nations, 1994).

³⁹ Lord Lugard, “Slavery in All Its Forms,” *Africa: Journal of the International African Institute* 6, no. 1 (January 1993), 1-14, 4.

pawning is “offering of services of a person in return for a loan.”⁴⁰ Pawning is “distinct from slavery” because it was viewed as being “only temporary and was not considered a disgrace.”⁴¹ Often if the pawn repays quickly, it is not an issue; however, often the debt is not repayed for decades or in some cases passed on to heirs.⁴² Peonage is used mostly in Central and South America where individuals pledge labor in exchange for either the payment of a debt or for a loan. Often those who agree to be peons do not realize that they are slaves until “gunmen kill a runaway and leave his body exposes for all to see or when they cut him up and feed the pieces to pigs.”⁴³ In India, debt bondage is often intergenerational because “when a father is too old to work his son may have to replace him, an event which usually occurs when the child is aged around 10.”⁴⁴ In many of these cases, the original debt continues to lead to more debt as the principle of the loan is not paid off and more money must be borrowed to survive.

Forced labor, another form of slavery, is similar to chattel slavery, except that the laborer is forced to work through either coercion or to survive, but there is not a legal status of being owned by the master. Often the slave is forced to “choose among very unpleasant options, between, for example, death, dismemberment, torture, endless confinement on the one hand, or back braking physical labor on the other.”⁴⁵ Forced

⁴⁰ Miers, 140.

⁴¹ Miers, 141.

⁴² Alain Testart, “The Extent and Significance of Debt Slavery,” *Revue Française De Sociologie* 43, Supplement: An Annual English Selection (2002), 173-204, 178.

⁴³ José de Souza Martins, “The Reappearance of Slavery and the Reproduction of Capital on the Brazilian Frontier,” in Tom Brass and Marcel van der Linden (eds.), *Free and Unfree Labour: The Debate Continues*, (Bern Germany: Peter Lang AG, 1997), 281-302, 301.

⁴⁴ Roger Sawyer, *Slavery in the Twentieth Century*, (London: Routledge & Kegan Paul, 1986), 128.

⁴⁵ Robert J. Steinfeld and Stanley L. Engerman, “Labor – Free or Coerced: A Historical Reassessment of Differences and Similarities,” in Tom Brass and Marcel van der Linden (eds.), *Free and Unfree Labour: The Debate Continues*, (Bern, Germany: Peter Lang AG, 1997), 107-126, 119.

labor does not include labor that is “part of criminal punishment, military service, to deal with emergencies, or normal civil obligations.”⁴⁶

Sex slavery, also a distinct form of slavery, has a variety of manifestations. One manifestation is historical and was called ‘white slavery’ and was when “white women were being sold into slavery to non-white males” for sexual purposes.⁴⁷ Sex tourism is another manifestation of sex slavery. This type of slavery involves individuals, typically children and younger women, working as prostitutes for tourists. Another manifestation has been referred to as “comfort girls,” who were used during World War II as sex slaves for Japanese soldiers.⁴⁸ These “comfort girls” have been found in conflicts throughout history. Another manifestation of sex slavery is hierodulic prostitution. Hierodulic prostitution is the giving of children, typically young girls, to temples or other religious groups.⁴⁹ In India, they are referred to as “devadasi” or “female servant of a deity” and in Ghana, they are called “trokosi” or “wives of the gods.”⁵⁰ These are just two examples of this type of sex slavery. These girls are “often raped by the priests and forced to work without pay or compensation.”⁵¹

Two slave-like practices, child labor and marital bondage, are also covered in Article I of the 1956 Convention; however, they typically are accepted as part of the other forms of slavery in the international community. Child labor is where “a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the

⁴⁶ Aust, 240.

⁴⁷ Karen E. Bravo, “Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade,” *Boston University International Law Journal*, (Fall 2007), 209-295, 217.

⁴⁸ Slomanson, 469.

⁴⁹ Anti-Slavery Society, *Hieroras*, <http://www.anti-slaverysociety.addr.com/hieroras.htm>.

⁵⁰ Andrea Parrot and Nina Cummings, *Sexual Enslavement of Girls and Women Worldwide*, (Westport, CT: Praeger Publishers, 2008) 49, 51.

exploitation of the child or young person of his labor.”⁵² Marital bondage is the practice when a women is “promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group” where she does not have the right to refuse; or, “the husband of a women, his family, or his clan, has the right to transfer her to another person for value received or otherwise;” or, “a women on the death of her husband is liable to be inherited by another person.”⁵³ Slave-like practices has now been expanded to include such actions as the recruitment of child soldiers and the removal of organs.⁵⁴

Modern Day Slavery

Slavery has existed for all of recorded history, but its modern forms have changed as compared to older forms of slavery. Older forms of slavery involved a legal and long-term relationship between the master and slave; a high purchase price but a low profit margin; maintenance of the slave; and, an emphasis on ethnic differences.⁵⁵ Newer forms of slavery involve an avoidance of a legal or long-term relationship; a very high profit margin due to a low purchase price; a surplus of disposable slaves; and, less concern over ethnic differences.⁵⁶ Another difference is that in historical forms of slavery, the slave was often not considered to be a full person under the law; however, modern day law will

⁵¹ Parrot and Cummings, 51.

⁵² Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956).

⁵³ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956).

⁵⁴ Office of the United Nations High Commissioner for Human Rights, *Abolishing Slavery and its Contemporary Forms*, (New York, NY: United Nations, 2002), 8.

⁵⁵ Bravo, 265.

⁵⁶ Bravo, 265.

recognize the full legal personality of a slave, with all the rights and obligations that are conferred with that status.⁵⁷

The traditional slave trade, large ships with a number of individuals chained in the holds like cattle or cargo to an open market, is no longer the primary method of transporting slaves. The shift has occurred because of expanded methods of transporting slaves and is now referred to as human trafficking in the international community.⁵⁸ Trafficking in human beings comprises of three different elements: action; through a means; and, goal of exploitation or for the purpose of exploitation.⁵⁹ The action element of trafficking includes one of the following: recruitment, transportation, transfer, harboring, or reception of persons.⁶⁰ A means includes the “threat of use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits to a person in control of the victim.”⁶¹ This means of control can be either physical or psychological, and in most cases, is psychological.⁶² Exploitation in this context “includes exploiting the prostitution of others, other forms of sexual exploitation, forced labor or services, slavery or similar practices, and the removal of organs.”⁶³ The buying and selling of people into servitude happens in both public methods, such as “cattle markets” for the Karamojong women, and in hidden methods, such as mail-order bride catalogs.⁶⁴

⁵⁷ Bravo, 271.

⁵⁸ John Ashcroft, “Path-breaking Strategies in the Global Fight against Sex Trafficking,” in Anna M. Troubnikoff (ed.), *Trafficking in Women and Children*, (New York, NY: Nova Science Publishers, Inc., 2003) 157-162, 159.

⁵⁹ Alexis A. Aronowitz, *Human Trafficking, Human Misery: The Global Trade in Human Beings*, (Westport, CT: Praeger Publishers, 2009), 1-2.

⁶⁰ Aronowitz, 1.

⁶¹ Aronowitz, 1.

⁶² See Aronowitz, 3.

⁶³ Aronowitz, 1.

⁶⁴ Aronowitz, 29.

While differences exist, modern day slavery is similar to historical slavery in some ways. Both historical and modern day slavery “include elements of control and ownership; the restriction or control of an individual’s autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator” where “the free will of the victim is absent.”⁶⁵ Modern and historic slavery also both involve humiliation, the breaking of the individuals who resist servitude, the branding and tattooing of victims, and children being born into servitude.⁶⁶ Another similarity between historical slavery and modern day slavery is the use of redemption. There have been cases of slaves’ freedom being purchased for as little as \$33 per slave late in the last century.⁶⁷ Finally, another similarity is the use of auctions for the purchase of slaves. While historical slavery was similar to cattle markets, the modern day auctions take place on the internet or in inconspicuous places, such as a coffee shop in an English airport.⁶⁸

INTERNATIONAL LEGAL TEXTBOOK RHETORIC

Just as in Chapter IV concerning piracy, slavery discussions in textbooks also has specific rhetoric can be discerned. This rhetoric demonstrates viewpoint of the community of international lawyers concerning the *jus cogens* nature of slavery, the relation between slavery and treaty law, jurisdictional issues, and the obligations that flow from this peremptory norm. The next generation of the international community of lawyers obtains its viewpoints and understanding of slavery through this rhetoric.

⁶⁵ Cassese, 2003, 75.

⁶⁶ Paola Monzini, (Translated by Patrick Camiller), *Sex Traffic: Prostitution, Crime and Exploitation*, (New York, NY: Zed Books, 2005), 81-83.

⁶⁷ E. Benjamin Skinner, *A Crime So Monstrous: Face-to-Face with Modern Day Slavery*, (New York, NY: Free Press, 2008), 82.

⁶⁸ Skinner, 133.

Slavery as *Jus Cogens*

The textbooks' rhetoric shows that despite the authors who claim that slavery and the slave trade fall into the category of *jus cogens*, there is no discussion of details or practical issues.⁶⁹ The basic *jus cogens* nature is established in by Dixon, McCorquodale and Williams because a treaty that contemplates participating in slavery is considered to be void as the prohibition on slavery is one of "the most obvious and best settled rules of *jus cogens*."⁷⁰ Slavery and the slave trade are referred to as one of the "many norms of human rights law [that] are peremptory in character from which no derogation is permitted."⁷¹ It is considered a "particularly egregious offense," which is part of "a body of general international human rights law" that is no longer disputed.⁷² These statements show that the prohibition of slavery and slave trading meets the requirements of peremptory norms in international law.

Slavery and slave-trade is regarded by the community of international lawyers as a fundamentally prohibited act or a "universal crime."⁷³ As stated by Joyner, "slavery or slave-related practices were among the earliest abrogations of human rights to be expressly condemned as international criminal offenses," and in some cases because these activities are "deemed unlawful simply because they are perceived to be so evil that they shock the conscience of humankind."⁷⁴ This "general condemnation of the slave

⁶⁹ Malone, 37. *See also* Dunoff, Ratner and Wippman, 60, Murphy, 81-83, Scott, 301, Weston, Falk, Charlesworth, and Straus, 146.

⁷⁰ Dixon, McCorquodale, and Williams, 2011, 92.

⁷¹ Armstrong, Farrell and Lambert, 173. Malone, 1998, 122 and Malone, 2011, 107.

⁷² Buergenthal and Murphy, 144. *See also* Lowe, 59, Cassese, 2001, 370.

⁷³ Epps, 2005, 106.

⁷⁴ Joyner, 2005, 73 and 136.

trade” is present in a number of international law textbooks.⁷⁵ The acceptance of slavery as *jus cogens* is seen in the oft-quoted statement that a slave trader is “an enemy of all mankind,” as it is viewed as the same as piracy in international law.⁷⁶

The *jus cogens* nature of the prohibition of slavery is reinforced by Aust in 2010 when he refers to it as an absolute right without being “subject to specific conditions or qualified in general terms.”⁷⁷ This prohibition has also been referred to by some as a *jus cogens* crime; however, this is not a common terminology.⁷⁸

Slavery and Treaty Law

International legal texts use treaty law to support the assertion that slavery has been abolished in international law. The Slavery Conventions of 1926 and 1956 are the two controlling treaties that ban slavery and slave trade in international law.⁷⁹ In addition to these treaties, authors discuss international agreements that ban slavery, such as the Statue of the International Criminal Court, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the American Convention on Human Rights.⁸⁰ Taken together, these substantive treaties and international agreements establish the treaty basis of the illegality of slavery and the slave trade in the rhetoric of the international legal community.

⁷⁵ Carter, Trimble and Bradley, 888. *See also* Damrosch, Henkin, Pugh, Schachter, and Smit, 1445, Evans, 2010, 291, and Aust, 2010, 10.

⁷⁶ Janis and Noyes, 188. *See also* Janis, 2008, 335, Evans, 307, Shaw, 550.

⁷⁷ Aust, 2010, 227.

⁷⁸ Evans, 2010, 754.

⁷⁹ Brownlie, 238.

⁸⁰ Cassese, 2003, 75. *See also* Epps, 311, D’Amato, 1994, 314, Aust, 240, and Shaw, 2008, 274-275.

Other texts discuss how UNCLOS III also has controlling provisions concerning the use of the high seas for the transport of slaves.⁸¹ Article 99 requires “that every state shall take effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag, and to prevent the unlawful use of its flag for that purpose.”⁸² UNCLOS III also provides in Article 100 that if a slave takes refuge aboard any ship they shall be declared free.⁸³ Article 110 of this Convention also “reaffirms the right of all public vessels to stop, visit, and search any merchant vessel on the high seas when there is reasonable ground for suspecting that the ship in question is engaged in the slave trade.”⁸⁴

In addition to finding support in treaty law, some authors state that the prohibition on slavery “is now accepted that the abhorrent practice subject to customary international law.”⁸⁵ This movement from a prohibition contained in treaty laws to an accepted customary law principle provides further support for the *jus cogens* nature of the prohibition and satisfies the positivist and naturalist traditions of international law. States are bound to follow the prohibition against slavery because “even if a State has not ratified a human rights treaty, it could be bound by customary international law” and “all States” are “bound when the human right is considered part of *jus cogens*.”⁸⁶

Slavery and Jurisdiction

The international legal community perpetuates the rhetoric that the international crime of slavery and slave-trading falls under universal jurisdiction. During the 19th

⁸¹ Carter, Trimble and Bradley, 888.

⁸² Von Glahn and Taulbee, 488.

⁸³ Von Glahn and Taulbee, 488.

⁸⁴ Von Glahn and Taulbee, 488.

⁸⁵ Aust, 2010, 251.

Century, the prohibition on slavery was considered to be one of the only exceptions other than piracy to the restriction that “virtually all matters that today would be classified as human rights issues were at that stage universally regarded as within the internal sphere of national jurisdiction.”⁸⁷ Support for universal jurisdiction is found in both treaty-based and customary law-based prohibitions of slavery.⁸⁸ Universal jurisdiction pertains to certain acts that are “considered so reprehensible by the international community that the usual rules of jurisdiction are waived and any state apprehending the alleged perpetrator is deemed competent to exercise its jurisdiction.”⁸⁹ Universal jurisdiction allows the case to be tried in any jurisdiction and “not confined to the state on whose territory the act took place, or the national state of the offender.”⁹⁰

Since slavery is considered to be “prejudicial to the interests of all states,” the application of universal jurisdiction is applied allowing for “states to have jurisdiction under their law over crimes committed abroad by foreign nationals against foreign nationals.”⁹¹ Agreement that the prohibition of slavery is one of the “core activities that trigger universal jurisdiction” is evident in the international community.⁹²

Slavery, Obligations and Enforcement

The rhetoric also concentrates on the establishment of an obligation to “capture, prosecute, and punish any offender on behalf of the international community.”⁹³ The 1926 Convention also requires that “all States take measures to suppress slavery and

⁸⁶ Dixon, McCorquodale and Williams, 2011, 200.

⁸⁷ Shaw, 2008, 270.

⁸⁸ Aust, 2005, 269-270. *See also* Buergethal and Murphy, 207 and 222, Carter, Trimble and Bradley, 888.

⁸⁹ Epps, 106

⁹⁰ Shaw, 2003, 234.

⁹¹ Aust, 2010, 44.

⁹² Epps, 2009, 115.

slave institutions, to release persons found in bondage, and to prosecute those found to be engaged in these activities.”⁹⁴ These treaty obligations have evolved because slavery is considered to be subject to universal jurisdiction and gives rise to obligations *erga omnes*.⁹⁵ These obligations are placed upon states regardless of the status of their signing or ratifying treaties that specifically outlaw slavery or attempt to suppress slavery because of the *jus cogens* status of slavery, which is shown in a number of textbooks by the discussion of the *Barcelona Traction* case.⁹⁶ In addition to these obligations, a trend found in international law textbooks is the discussion of the ability of states to exercise jurisdiction over ships on the high seas that are suspected of slave trade, including the right to visit or board.⁹⁷

Despite the inclusion of the slavery prohibition in the texts, slavery and the slave trade are viewed as a former problem that do not have much relevance in modern-day discussions and are mostly regulated to historical issues. It is often used as an example of the power of non-governmental organizations, such as the Anti-slavery Society and other British abolitionist groups.⁹⁸ Discussions also concentrate on the use of state interests when negotiating international treaties. For example, when the General Act of the Brussels Conference relative to the African Slave Trade of 1890 was negotiated, Great Britain was able to use the prohibition on the slave trade to take “a central role as a maritime enforcement agency controlling shipping,” but not just for purposes of suppressing the slave trade, despite that being the purpose under the treaty.⁹⁹ Britain

⁹³ Joyner, 2005, 151.

⁹⁴ Bederman, 2010, 108.

⁹⁵ Scott, 2010, 25.

⁹⁶ Cassese, 2005, 394. *See also* Malanczuk, 58.

⁹⁷ Brownlie, 238. *See also* Buergenthal and Murphy, 222.

⁹⁸ Armstrong, Farrell and Lambert, 168.

⁹⁹ Malanczuk, 2003, 21.

could “monitor overseas trade by other states in goods in general.”¹⁰⁰ Some authors do briefly discuss the modern-day issues of ineffective enforcement, but these discussions are few and far between.¹⁰¹

What does the Rhetoric Mean?

What is the rhetorical picture being perpetuated by the international community of lawyers? As far back as 1896, international law books have claimed that the slave trade is not allowed under international law and should be punished by all states.¹⁰² This is over a hundred years of international agreements to stop the crime of slavery; however, the trials and prosecutions for slave trading and slavery have been few, as seen below. The prohibition of slavery meets the requirements of a *jus cogens* norm. No state may promulgate a treaty to participate in slave trade or slavery. Any such treaty would be void under international law. No state may derogate from the prohibition of slavery. These aspects of *jus cogens* are found in the epistemic community’s rhetoric concerning the prohibition of slavery and the slave trade.

The peremptory nature of the prohibition on slavery also gives rise to obligations to prosecute offenders regardless of jurisdiction. The prohibition of slavery also has considered support in customary international law that has been developing for the last two hundred years. These obligations are supported in the international agreements such as the Slavery Conventions of 1926 and 1956, the Statute of the International Criminal Court, and UNCLOS III. Despite the strong status in international law that slavery appears to have given the rhetoric of the international community of lawyers, which

¹⁰⁰ Malanczuk, 2003, 21.

¹⁰¹ Von Glahn and Taulbee, 2007, 487-488.

should have eliminated the problem of slavery in the modern world, the next section shows that the reality is very different.

CONTEMPORARY REALITY

Modern slavery is ongoing problem that affects every state in the world. Despite a common belief that slavery died out in the 1800s, today's slaves operate in a variety of domains, including, but not limited to, agriculture, harvesting of raw materials, creation finished goods, sex trade, domestic work, and fishing.¹⁰³ As summarized by Ambassador Luis CdeBaca, "modern slavery continues to be a reality for millions of people, rather than for an isolated few."¹⁰⁴

It is difficult to obtain accurate data on the extent of human trafficking because of its nature as an "underground activity" and its low priority in law enforcement efforts.¹⁰⁵ Another problem with gaining accurate insight into slavery and human trafficking is that many states do not provide or do not track the number of reported incidents.¹⁰⁶ Since 1964, when the United Nations Economic and Social Council first began to send slavery questionnaires to member states, states have "self-righteously denied the existence of slavery within their borders."¹⁰⁷ In addition to the low priority, there is often collusion between law enforcement and those trafficking in humans. Often the law enforcement personnel can choose to either "cooperate with the thugs and make a profit, or attempt to

¹⁰² Herbert Wolcott Bowen, *International Law: A Simple Statement of Its Principles*, (New York: G.P. Putnam's Sons, 1896), 77.

¹⁰³ United States Department of State, *Trafficking in Persons Report*, June 2011.

¹⁰⁴ United States Department of State, 2011, 2.

¹⁰⁵ Alison Cole, "Reconceptionalising Female Trafficking: The Inhuman Trade in Women," *Cardozo Journal of Law and Gender*, (Summer, 2006), 789-820, 799. See also Alexis A. Aronowitz, *Human Trafficking, Human Misery: The Global Trade in Human Beings*, (Westport, CT: Praeger Publishers, 2009), 15.

¹⁰⁶ Aronowitz, 153.

¹⁰⁷ Roger Sawyer, *Slavery in the Twentieth Century*, (London: Routledge & Kegan Paul, 1986), 15.

enforce the law and die.”¹⁰⁸ This mentality is seen around the world in places like Russia, Thailand, Brazil, Ghana, Pakistan and the Philippines. These factors hide the magnitude of the problem of slavery and human trafficking, thus leading researchers to conclude that the incident of slavery and servitude around the world is under reported and under documented.¹⁰⁹

The population of slaves throughout the world is “greater than the population of Canada” because “there are more slaves alive today than all the people stolen from Africa in the time of the transatlantic slave trade.”¹¹⁰ Estimates of the number of people enslaved around the world range from 12.3 million to 29 million.¹¹¹ These enslaved individuals are everywhere, such as it is estimated that there are at least 3,000 household slaves in the city of Paris.¹¹² Women and children as especially vulnerable, thus twenty percent of people trafficked are children worldwide.¹¹³ Given that slaves cost an average of \$90, the number of slaves continues to rise.¹¹⁴

The “profit to cost ratio is so high” in modern trafficking, especially the case of women, that the trafficker “accru[es] massive profits with very low overhead long after initial outlays have been covered.”¹¹⁵ In addition to the low overhead, the demand for slaves or trafficked humans is high and the cost for being captured or punished are

¹⁰⁸ Bales, 2004, 31.

¹⁰⁹ Aronowitz, 15.

¹¹⁰ Kevin Bales, *Disposable People: New Slavery in the Global Economy*, (Berkley, CA: University of California Press, 2004), 9.

¹¹¹ United States Department of State, *Trafficking in Persons Report*, June 2010. See also Siddharth Kara, “Sex Slavery Transcript,” *Policy Innovations* (January 27, 2009).

¹¹² Bales, 2004, 3.

¹¹³ Alexandra Poolos, *Modern-day Slavery on the Rise*, <http://ac360.blogs.cnn.com/2009/02/19/modern-day-slavery-on-the-rise/>.

¹¹⁴ Good, *Modern Slavery: A Primer*, found at <http://awesome.goodmagazine.com/transparency/001/trans001slavery.html>.

¹¹⁵ Alison Cole, “Reconceptualising Female Trafficking: The Inhuman Trade in Women,” *Cardozo Journal of Law and Gender*, (Summer 2006), 789-820, 799.

extremely low, adding to the benefit of being a slaver or trafficker.¹¹⁶ According to Stoeker, “the head operations for the UN crime prevention remarked bluntly...’the earnings are incredible. The overhead is low – you don’t have to buy cars and guns. Drugs you sell once and they are gone. [Slaves] can earn money for a long time.’”¹¹⁷

Technology influences the practice of human trafficking and slavery. The speed at which individuals can move from one end of the globe to another has increased the frequency and ease that human traffickers can transport their goods, in some cases, as quickly as a blink of an eye. The “Rape Camp” website, unfortunately one of many around the world, “showed Asian women as sex slaves blindfolded, gagged, and tied during sex acts in bondage, discipline and humiliation” that “asked viewers to humiliate these Asian sex slaves to your heart’s content.”¹¹⁸ The internet also provides increased communication among people who are looking to buy and sell people.

Examples of Modern Day Slavery

The variety of examples of modern day slavery is as diverse as the world’s population. There is no region of the world that is not affected. In Brazil, charcoal camps that enslave men in a forced labor situation that have been referred to as ‘concentration camps.’¹¹⁹ These men who are working at these charcoal camps never have the opportunity to pay back the principle on their loans as they are charged interest

¹¹⁶ James O. Finckenauer and Jennifer Schrock, “Human Trafficking: A Growing Criminal Market in the U.S.,” in Anna M. Troubnikoof, *Trafficking in Women and Children*, (New York, NY: Nova Science Publishers, Inc., 2003), 31-38, 35.

¹¹⁷ Sally Stoeker, “Human Trafficking: A New Challenge for Russia and the United States,” in Sally Stoeker and Louise Shelley (eds.), *Human Traffic and Transnational Crime: Eurasia and American Perspectives*, (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2005), 13-28, 14.

¹¹⁸ Andrea Parrot and Nina Cummings, *Sexual Enslavement of Girls and Women Worldwide*, (Westport, CT: Praeger Publishers, 2008), 9.

¹¹⁹ Bales, 2004, 129.

and for food, clothing, and shelter at exorbitant rates and those who try to escape without repayment are killed or maimed.¹²⁰ Another example of slavery in Brazil is the number of child prostitutes has been estimated as high as 500,000.¹²¹ In Haiti, author Skinner was able to negotiate the purchase of a child for less than a cab fare across New York City.¹²²

In Germany and England, individuals from economically depressed areas throughout other parts of Europe answer “advertisements for barmaids, receptionists, and croupiers” prior to becoming enslaved.¹²³ In North America, slavery has survived “in areas of pornographic film making, forced prostitution, and preying on migrants.”¹²⁴ Turkish children have been imported into Belgium under the guise of apprenticeships to be used as domestic servants.¹²⁵ Moroccan women are trafficked into France and Holland, while Thai girls are trafficked into Germany for purposes of prostitution.¹²⁶

In Asia, a number of states have significant problems with slavery. Thailand has a large number of sex slaves and is considered to be one of the most popular sex tourism destinations. Thailand’s interior minister was a proponent of the sex tourism trade, despite that the result has been thousands of girls and women being bought and sold into sexual slavery each year.¹²⁷ In China, snakeheads are human traffickers. These snakeheads are concentrated in Hong Kong, Taiwan, Macao, and other areas of southern China; however, they also are seen in large immigrant communities throughout the

¹²⁰ Sawyer, 1986, 123.

¹²¹ Sara Dillon, “What Human Rights Law Obscures: Global Sex Trafficking and the Demand for Children,” *UCLA Women’s Law Journal*, (Winter 2008), 122-186, 129.

¹²² E. Benjamin Skinner, *A Crime So Monstrous: Face-to-Face with Modern Day Slavery*, (New York, NY: Free Press, 2008), 12.

¹²³ Sawyer, 1986, 103.

¹²⁴ Sawyer, 1986, 90.

¹²⁵ Sawyer, 1988, 106.

¹²⁶ Sawyer, 1988, 107.

world.¹²⁸ Cambodia's economy is "classified as a state whose economy is in part dependent on offering underage sex to tourists as a 'specialty.'"¹²⁹ In Nepal, debts from bonded labor can be inherited where entire families spend generations in servitude from a loan.¹³⁰ In India, the most common form of slavery is debt bondage, including intergenerational debt bondage.¹³¹ India is also one of the states that strongly deny there is even a problem with servitude. During a meeting of the Haryana State Legislative Assembly, "The Chief Minister was scornful and declared that there was not one bonded labourer in his entire area; it subsequently transpired that he owned some of the quarries making full use of the system."¹³² Another form of slavery in India is the aforementioned *devadasi*, or religious slaves, which has risen to a number of new slaves 15,000 annually.¹³³ In Pakistan, bonded laborers are used on government contracts to dig irrigation channels and to build dams.¹³⁴ To fulfill these contracts, recruiters go to small villages and give cash advances to the parents of young men in exchange for their sons being bonded until the money is repaid. The camps which these young men are sent to are virtual prisons with guards armed with pistols and dogs where the individuals who attempt escape are bound by chains.¹³⁵

¹²⁷ Parrot and Cummings, 54 and 74.

¹²⁸ Louise Shelley, "Russian and Chinese Trafficking: A Comparative Perspective," in Sally Stoecker and Louise Shelley (eds.), *Human Traffic and Transnational Crime: Eurasia and American Perspectives*, (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2005), 63-78, 71.

¹²⁹ Dillon, 171.

¹³⁰ Alessandro Cigno and Furio C. Rosati, *The Economies of Child Labour*, (New York, NY: Oxford University Press, 2005), 47.

¹³¹ Sawyer, 1986, 128.

¹³² Sawyer, 1986, 133.

¹³³ Parrot and Cummings, 49.

¹³⁴ Sawyer, 1986, 141.

¹³⁵ Sawyer, 1986, 141.

Dubai and the United Arab Emirates frequently imports migrant workers for domestic servants or the construction industry.¹³⁶ These workers are kept in situations of involuntary servitude because their passports are confiscated by their employers and no ability to receive help from the government.¹³⁷ Women are sold outright from Bangladesh, Pakistan, and Nepal for approximately \$3,000 to \$10,000 to wealthy individuals throughout the Middle East. These women live approximately two years before “the client becomes bored with her, she is abandoned and left to die from the sadistic abuse which he and his friends have subjected to her,” at which time “the client will then simply purchase another young woman.”¹³⁸ Another type of slavery that is seen in this region, and in Africa, is camel jockeys, who are starved and denied water while working on farms to maintain their regulation weight for camel races.¹³⁹

In Russia and other former Soviet Union states, slavery has significantly increased, especially trafficking of children and women. While the main problem faced by traffickers in these areas is obtaining a child because many parents do not want to sell their children for cultural reasons, traffickers have found a way to circumvent this problem by obtaining children from orphanages and hospitals.¹⁴⁰ Another form of slavery in this area is the kidnapping of individuals for use as labor, commodities to be

¹³⁶ Jessica Caplin, “Mirage in the Desert Oasis: Forced Labor in Dubai and the United Arab Emirates,” *Harvard International Review*, (Winter 2009), 28-32.

¹³⁷ Caplin, 29.

¹³⁸ Anti-Slavery Society, *Odaliques*, <http://www.anti-slaverysociety.addr.com/odalisques.htm>.

¹³⁹ Asian Development Bank, *Combating Trafficking of Women and Children in South Asia: Regional Synthesis Paper for Bangladesh, India, and Nepal*, (Manila, Philippines: Asian Development Bank, April 2003), 36.

¹⁴⁰ Mikhail Kleimenov and Stanislav Shamkov, “Criminal Transportation of Persons: Trends and Recommendations,” in Sally Stoecker and Louise Shelley (eds.), *Human Traffic and Transnational Crime: Eurasia and American Perspectives*, (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2005), 29-46, 42.

sold to the highest bidder, and for their organs.¹⁴¹ In addition to the buying of children and kidnapping, human traffickers control the slaves, particularly women used for prostitution around the world, by threatening their families with harm.¹⁴² Trafficking of women and threats to their families back home has created what is called “the second wave,” which is the use of a previously trafficked woman to find new victims from her hometown.¹⁴³

In Africa, the slave trade has been firmly reestablished where “following the old slave trade routes, except that trucks, jeeps and modern four-wheel drive vehicles and, on occasions, aircraft, have replaced camels.”¹⁴⁴ In poorer states, such as Benin and Togo, children are purchased from their parents, or simply kidnapped, and then sold in wealthier states such as Nigeria and Gabon for five times the purchase price.¹⁴⁵ A child can “still be born a slave in parts of Algeria, Burkina Faso, Cameroun, Chad, Guinea, Ivory Coast, Mali, Mauritania, Niger, Nigeria, Senegal and Sudan.”¹⁴⁶ In Western Africa, the cocoa plantations in rural areas use slave labor where the slaves are beaten by an overseer, fed improperly, work long hours, locked up at night, and often killed if they attempt to escape.¹⁴⁷

Mauritania is possible the most extreme example of modern day slavery. A law passed in 1980 outlawed slavery and provided compensation to the slave owners for the

¹⁴¹ Kleimenov and Shamkov, 33.

¹⁴² Stoecker, 23.

¹⁴³ Liudmila Erokhina, “Trafficking in Women in the Russian Far East: A Real or Imaginary Phenomenon?” in Sally Stoecker and Louise Shelley (eds.), *Human Traffic and Transnational Crime: Eurasia and American Perspectives*, (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2005), 79-94, 83.

¹⁴⁴ Anti-Slavery Society, *Slave Trade*, <http://www.anti-slavery.addr.com/slavetrade/htm>.

¹⁴⁵ Anti-Slavery Society, *Slave Trade*.

¹⁴⁶ Roger Sawyer, *Children Enslaved*, (New York, NY: Routledge, 1988), 22.

¹⁴⁷ Anti-Slavery Society, *Chocolates*, <http://www.anti-slaverysociety.addr.com/chocolates1.htm>.

freed slaves; however, no compensation has been paid.¹⁴⁸ Since no compensation has been paid by the government, the slave owners refuse to release their slaves because they view these slaves as “a kind of collateral held against the compensation debt owed to them by the government.”¹⁴⁹ Occasionally a non-governmental organization will help bring a suit against a slave owner for a lesser offense, such as an illegal confinement, but even on the off chance that that a court does find the perpetrator guilty, no one has ever been punished.¹⁵⁰ One of the methods for controlling slaves is to take the slaves’ legs and tightly tie them to the sides of a camel who has been denied water for weeks, then let the camel drink until its stomach expands, the slaves’ legs, thighs, and groin are slowly dislocated and stretched.¹⁵¹ The type of slavery that is practiced in Mauritania is the same kind of slavery that was practiced during the 1700s and 1800s during the transatlantic slave trade.

Perhaps one of the most despicable forms of human trafficking is the underground market in organs and other body parts because it involves groups of individuals whose calling in life is to help others, specifically medical professionals and law enforcement. Doctors and medical staff “knowingly remove healthy organs from individuals not related to the recipients,” for implant in wealthy clients.¹⁵² It has been estimated that as many as 6,000 fraudulent international kidney transactions occur in a given year.¹⁵³

¹⁴⁸ Bales, 2004, 109.

¹⁴⁹ Bales, 2004, 109.

¹⁵⁰ Bales, 2004, 109.

¹⁵¹ Bowe, 155.

¹⁵² Aronowitz, 114.

¹⁵³ Aronowitz, 115.

State and Law Enforcement Response

Law enforcement, promulgated laws, and other legal remedies in most states are inefficient.¹⁵⁴ Often when laws have been passed, the laws are not being implemented or being applied incorrectly. For example, in India, bonded labor is illegal under the constitution, but this right is not being implemented.¹⁵⁵ The general perception of communities on borders in a number of states is that the human trafficking networks are “organized and protected.”¹⁵⁶ In Bangladesh, some trafficking laws “are sometimes misapplied with the result that victims were charged with immoral behavior and put in jail.”¹⁵⁷ In some cases, United Nations peacekeepers, also known as blue helmets, would press women into slavery in a number of states, including Cambodia, the Congo, Eritrea, and Bosnia.¹⁵⁸

The corruption of government and law enforcement officials is vital to the success of slavery and human trafficking operations.¹⁵⁹ Human traffickers “are known to often enjoy high-level political patronage.”¹⁶⁰ Some officials, such as border guards, police and consular officials, take monetary payment; however, other officials “partake of free sexual services in exchange for ignoring trafficking and sometimes engaging in trafficking directly.”¹⁶¹ Officials have a variety of ways to participate in human

¹⁵⁴ Francis T. Miko, “Trafficking in Women and Children: The U.S. and International Response,” found in Anna M. Troubnikoof (ed.), *Trafficking in Women and Children*, (New York, NY: Norva Science Publishers, Inc., 2003), 1-30, 4.

¹⁵⁵ Christien van den Anker, “Contemporary Slavery, Global Justice and Globalization,” found in Christien van den Anker (ed.), *The Political Economy of New Slavery*, (New York, NY: Palgrave Macmillan, 2004), 29.

¹⁵⁶ Asian Development Bank, 20.

¹⁵⁷ Asian Development Bank, 89.

¹⁵⁸ Skinner, 176.

¹⁵⁹ Aronowitz, 62.

¹⁶⁰ Commonwealth Secretariat Human Rights Unit, *Report of the Expert Group on Strategies for Combating Trafficking of Women and Children: Best Practice*, (London: Marlborough, 2003), 12.

¹⁶¹ Aronowitz, 62. See also Bales, 2004, 64.

trafficking. One method is for government officials to provide fake documentation, such as passports and visas, for the transport of individuals across international borders.¹⁶² Border guards and passport inspectors also accept bribes to let in the fake documentation, in almost every state in the world, including the United States.¹⁶³ Bribery is so common from Nepal to India that “border bribes had normalized to 2 percent to 5 percent of the final price of the slave, depending upon the experience of the slave trader.”¹⁶⁴ Another method is to use the police as enforcers of human trafficking networks or to return runaway slaves, such as in Benin.¹⁶⁵ Judges and prosecutors also participate in corruption that prevents the prosecution of human traffickers. In Moldova, a trafficking case was dismissed by a judge “on the basis that the women chose to work as prostitutes and ‘felt good’ being there.”¹⁶⁶ Even diplomats misuse the visa system to traffic domestic workers around the world, including into the United States when stationed at the United Nations.¹⁶⁷

The United States has become a world leader in pushing for the elimination of slavery and human trafficking, but it is still barely a drop in the bucket given the number of slaves. It has been estimated that less than 2 percent of the slaves in the United States were liberated between 2000 and 2006, while as many as 17,500 new slaves enter every

¹⁶² Anna Repetskaia, “Classifying the Elements of Human Trafficking Crimes,” found in Sally Stoecker and Louise Shelley (eds.), *Human Traffic and Transnational Crime: Eurasia and American Perspectives*, (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2005), 47-62, 50-51.

¹⁶³ Sheldon X. Zhang, *Smuggling and Trafficking in Human Beings: All Roads Lead to America*, (Westport, CT: Praeger, 2007), 101 and 102.

¹⁶⁴ Siddharth Kara, *Sex Trafficking: Inside the Business of Modern Slavery*, (New York, NY: Columbia University Press, 2009), 68.

¹⁶⁵ van den Anker, 29.

¹⁶⁶ Kara, 126.

¹⁶⁷ Krista Friedrich, “Statutes of Liberty? Seeking Justice Under United States Law When Diplomats Traffic in Persons,” *Brooklyn Law Review*, (Spring 2007), 1139-1171.

year.¹⁶⁸ In 2003, the United States passed the PROTECT Act that “makes it a crime for any United States citizen or alien to ‘travel in foreign commerce, and engage in any illicit sexual conduct with another person’... under 18 years of age.”¹⁶⁹ Recently the United States federal government indicted six individuals in Honolulu for trafficking four hundred Thai farm workers, which is one of the largest human trafficking cases.¹⁷⁰ This is the second recent case in Hawaii concerning human trafficking. The first being two brothers indicted for the human trafficking of forty-four Thai farm workers in 2004.¹⁷¹ Despite these recent cases and other limited past prosecutions, an attorney at the Justice Department admitted that “prosecutors can only pursue those slavery operations that seem like surefire wins.”¹⁷² In addition to pushing only for wins, these “slavery cases typically take years to investigate and prosecute, presenting a wide array of special challenges few public officials are trained to handle.”¹⁷³ Some other states have attempted different approaches to ending trafficking. Canada recently suspended marriages between their citizens and Cambodian women.¹⁷⁴ This 2008 law had the unintended consequence of increasing the number of marriages brokered with South Korean men.¹⁷⁵

Arrests are occasionally made, but they are still few and far between given the large numbers of slaves throughout the world. According to the 2010 Trafficking in

¹⁶⁸ E. Benjamin Skinner, “A World Enslaved,” *Foreign Policy*, (March/April 2008), 62-67, 64-65.

¹⁶⁹ Kyle Cutts, “2007 Note of the Year: A Modicum of Recovery: How Child Sex Tourism Constitutes Slavery Under the Alien Tort Claims Act,” *Case Western Reserve Law Review*, (Fall 2007), 277-310, 285.

¹⁷⁰ Julia Preston, “Indictment Accuses Firm of Exploiting Thai Workers,” *The New York Times*, September 4, 2010.

¹⁷¹ Lawrence Downes, “In an Ugly Human-Trafficking Case, Hawaii Forgets Itself,” *The New York Times*, September 21, 2010.

¹⁷² John Bowe, *Nobodies: Modern American Slave Labor and the Dark Side of the New Global Economy*, (New York, NY: Random House, 2007), 22.

¹⁷³ Bowe, 21.

¹⁷⁴ Parrot and Cummings, 33.

Persons Report, the identified victims average out to 18 per 1000 world inhabitants.¹⁷⁶

Despite this rate of trafficking victims around the world, there were only 5,606 prosecutions worldwide in 2009, of which 4,166 resulted in convictions.¹⁷⁷ In 2010, the number of prosecutions increased to 6,017. In 2011, the number of convictions dropped to 3,619.¹⁷⁸

There are a few recent examples of prosecutions and convictions; however, the majority of the cases do not make news, thus slavery remains a largely hidden problem. The following are examples of recent cases that have been reported. In March 2010, seven people suspected of trafficking were arrested for transporting women to South Africa from Mozambique and China.¹⁷⁹ In 2008, Russia sentenced a group of men who had been selling women into sexual slavery for years. The longest sentence was eight years for trafficking over 200 women.¹⁸⁰ The Economic Community of West African States (ECOWAS) Community Court of Justice found that Niger had failed to protect Hadijato Mani from slavery when she was sold in 1996; however, it failed to conclude that this judgment was applicable to other possible victims.¹⁸¹ In 2009, Spain broke up a human trafficking network that controlled Nigerian women through the use of voodoo curses.¹⁸²

¹⁷⁵ Parrot and Cummings, 33.

¹⁷⁶ United States Department of State, *Trafficking in Persons Report*, June 2010, 7.

¹⁷⁷ United States Department of State, 2010, 45.

¹⁷⁸ United States Department of State, 2011, 42.

¹⁷⁹ The Associated Press, "Mozambique: Police Accuse 7 Suspects of Trafficking Women Into South Africa," *The New York Times*, March 27, 2010.

¹⁸⁰ "Russian Court Sentences Men for Human Trafficking," *BBC Monitoring Former Soviet Union – Political*, May 22, 2008.

¹⁸¹ *The Irish Times*, "Court Convicts Niger in Landmark Slavery Case," October 28, 2008.

¹⁸² Victoria Burnett, "Spain Links Voodoo to Forced-Prostitution Case," *The New York Times*, May 23, 2009.

Overall, modern day slavery is a significant issue. Slavery is “the goose that lays the golden eggs” because “human beings once enslaved can continue to produce more and more value.” The human toll on the individuals who are suffering is staggering. The problem of slavery and human trafficking is becoming an item on the international political agenda, but is still largely being underrepresented given the suffering that this issues cause.¹⁸³ While there are occasionally prosecutions of human traffickers, the majority of modern violators of slavery provisions do not have to worry about being caught or punished. The gap between the international legal rhetoric and the reality is emphasized by the continued flagrant collusion between states and/or state actors and those who are breaking the law.

RHETORIC/REALITY GAP

The gap between the international legal community’s rhetoric on slavery and the reality of enforcement of *jus cogens* norms is evident in the estimated 20 to 30 million people¹⁸⁴ held in slavery today. The continued increase in slavery and the lack of substantial prosecution by states shows that there is a significant difference between the rhetoric of the international legal community and the reality of the situation.

According to the community’s rhetoric, the norm of prohibiting slavery falls within the category *jus cogens*. Despite the strength of the prohibition, this does not mean that this will be sufficient to stop the violation of the norm. Even though slavery has been illegal under international law and accepted by all states as illegal, the duties and obligations that flow from this *jus cogens* norm are not being fulfilled. The

¹⁸³ Claudia Aradau, *Rethinking Trafficking in Women: Politics Out of Security*, (New York, NY: Palgrave Macmillan, 2008), 12.

international legal system recognizes that slavery is a peremptory norm under international law, but this recognition does not transform into freedom for enslaved individuals.

The Gap Contained in Treaties and Definitions

The treaty basis for the peremptory norm of slavery, the combination of the Slavery Conventions of 1926 and 1956 and the provisions of UNCLOS III, is also contained in the rhetoric of the textbooks. The provisions of UNCLOS III are only applicable for ships on the high seas, which have been shown to be an unlikely method of transport for slaves in the modern day. The provisions of the 1926 and 1956 conventions do not take into account the changes in slavery due to technological advances, such as the Internet, and the transnational nature of modern day slavery and human trafficking, as they are mostly based on sovereign enforcement. While these documents provide definitions that had been lacking in international law, they do not give sufficient basis for prosecution or capture of human trafficker or help free individuals, thus further demonstrating the gap between the rhetoric and reality.

The Gap of Universal Jurisdiction

The rhetoric includes the use of universal jurisdiction as a means to provide states the ability to prosecute anyone participating in human trafficking. The establishment of universal jurisdiction allows for states to pursue legal action against human traffickers without having to worry about jurisdictional issues. The international legal community's rhetoric opens any jurisdiction in the world to prosecute, yet states are not taking

¹⁸⁴ J.J. Gould, "Slavery's Global Comeback," *The Atlantic*, December 19, 2012.

advantage of this open venue. The belief of the international legal community, as demonstrated by its rhetoric concerning universal jurisdiction, is not aligned with the reality of the lack of states pursuing this avenue of prosecution.

The Gap of Duties and Obligations of States

The prohibition of slavery as a peremptory norm places duties and obligations upon states to prosecute human traffickers under the provisions of international law. The freedom that many human traffickers feel to be free from prosecution, as demonstrated previously in this chapter, shows that the enforcement obligations and duties flowing from *jus cogens* are not being fulfilled. This lack of prosecution is a violation of international law; however, there is more significant evidence of a rhetoric/reality gap in the evidence of state collusion as manifested in political protection and state involvement in human trafficking.

CONCLUSION

The above provides further evidence that a gap exists between the international legal system and the reality of state action. This gap is observed because of the strength of peremptory norms in international law, specifically in this case slavery, is irrefutable in international law rhetoric, but the practical application of these principles is lacking in reality. This gap as it relates to the norm of slavery further demonstrates the disconnection between the epistemic community and the actions of international actors.

Since the investigation of the *jus cogens* norms prohibiting slavery and piracy presented above demonstrates the existence of the gap between the rhetoric of

international law and reality of state behaviors, an examination of the implications of this gap is necessary. The following chapter focuses on these implications.

CHAPTER VI

IMPLICATIONS OF THE GAP BETWEEN RHETORIC AND REALITY

This study examined both the rhetoric of the international legal system and the reality of actions of state actors with regard to the canon of international law, specifically the core tenets of *jus cogens*. The research goes beyond the basic examination of the legal community's rhetoric or a straightforward look at the reality of international law concerning piracy and slavery. The principal outcome of the research is that a gap is apparent between the rhetoric of the law and the practice of states in its application. The intent of the following is to explain the implications that emanate from this gap.

The rhetoric and reality of international law are two of the four sources of international law found in Article 38 of the ICJ Statute. The discontinuity between the sources concerning *jus cogens* has a ripple effect throughout the international legal system. This ripple effect can also be seen in the modern day understanding of the system by the community of international lawyers. Beyond the implications for peremptory norms, the gap between the rhetoric of the epistemic community of lawyers and the reality of state actions indicates possible issues throughout the international legal system. Tension that is caused by discontinuity in what is widely regarded as the strongest and most robust area of international law, peremptory norms, is detailed throughout this chapter.

The following reviews the current argument concerning the gap between rhetoric and reality and analyzes the different implications that flow from this gap for the tenets of *jus cogens* and the international legal system.

ARGUMENT REVIEW

The purpose of this study is to analyze the discontinuity between the sources of international law from Article 38 of the ICJ Statute concerning peremptory norms and what this gap implies. To understand the rhetoric, the ideas and values of the international legal community was examined in relation to the general concept of *jus cogens* and two particular instances, the prohibitions against piracy and slavery. The reality of the current practices of international actors was surveyed in detail concerning the two peremptory norms of the prohibition against piracy and slavery. The previous chapters have provided evidence of this gap, as summarized below.

Article 38.1 of the Statute of the International Court of Justice

The sources of international law are set out in Article 38 of the *Statute of the International Court of Justice*. This article is the key place to start to understand any principle in international law. The two relevant portions of this statute for this project are 38.1.b, “international custom, as evidence of a general practice accepted as law” and 38.1.d, the “judicial decisions and teachings of the most highly qualified publicists of various nations.”¹ Since this statute is considered to be “the most authoritative”² statement as to the sources of international law, when a discontinuity exists between two of the sources, it indicates an issue worth examining.

In the case of peremptory norms, this project has shown that the teachings of international lawyers do not align with the international custom of state actors. The judicial decisions and teachings have been demonstrated by the rhetoric of the epistemic

¹ “Charter of the United Nations and Statute of the International Court of Justice,” 1945, 26.

community of international lawyers. The international custom of state actors has been shown by examining the current reality concerning the core tenets of *jus cogens*, the prohibitions against piracy and slavery. A gap has been identified between the rhetoric and the reality concerning peremptory norms based upon the discontinuity of the sources of *jus cogens* as indicated by Article 38.

Methodology

This project uses crucial case methodology with a window into the epistemic community allowing an assessment into the state of the international legal system. Peremptory norms were chosen to be examined for this project because the unique status of *jus cogens* in international law, thus functioning as a crucial case. Crucial case methodology is used in this project by examining the case, peremptory norms, that “provide[s] the most definite type of evidence”³ as compared to lesser norms within the international legal system. As previously seen in Chapter I, by using *jus cogens*, information and understanding can be extrapolated about the international legal system since it is “the *most-likely* case shown to be negative.”⁴

These norms are considered to be the strongest and most robust of all norms in international law. They are perceived to be on the top of the hierarchy of international legal principles, due to their prohibition on derogation. The special status of *jus cogens* means that “[t]he duties to prosecute the core international crimes both under conventional and customary international law are stated in quite unconditional and imperative terms, thus leaving no room for some kind of margin of appreciation for

² Shaw, 2008, 70.

³ George and Bennett, 2004, 120.

considering alternative factors to justify the failures of prosecution.”⁵ *Jus cogens* is seen as having the ability to overcome jurisdictional issues and call upon states to provide support for the enforcement of these tenets. These norms are considered to have the ability to proscribe behavior, provide predictive elements, and enjoy historical precedence and continued support throughout the international legal community. The prohibitions against piracy and slavery are the core of these peremptory norms, thus providing more evidentiary support for the premise of this project.

The epistemic community in question is made up of experts who have a “competence in a particular domain,”⁶ in this case, international law. This community of international lawyers is held together by similar methods and the transference of knowledge and ideals of the community to new members and outsiders. Epistemic communities, in specific issue areas, can influence policy orientations and can provide “recognized expertise and competence in a particular domain.”⁷

REVIEW OF THE RHETORIC/REALITY GAP

The gap between the rhetoric of the international legal community and the reality of the actions of states raises questions about the strength of *jus cogens* in the international legal system. This gap is based on the disconnect between the sources of international law with the rhetoric of the community of international lawyers on one side and the reality of state action on the other side. The legal textbooks provide the written record of the system norms being passed from one generation of practitioners of international law to another generation. There are common threads being passed on

⁴ Gerring, 2001, 220.

⁵ Orakhelashvili, 2006, 233.

concerning *jus cogens* in general and the two core tenets, the prohibitions against piracy and slavery. The reality of the tenets of *jus cogens* was examined as it relates to the particular state actions regarding the prohibitions against piracy and slavery.

The Rhetoric of the International Legal Community

In understanding the general concepts of peremptory norms, a number of common rhetorical themes were observed. These themes were measured through the teaching of international law that is perpetuation of the epistemic community of international lawyers. The relatively uniform ideals and values of the international legal community are seen throughout the international legal system through conventions and judgments.⁸ An examination of the rhetoric contained in international legal textbooks allowed for the identification of specific ideals and values as they relate to peremptory norms.

There are several general themes that are contained within the international legal textbooks relating to the overall nature and substance of *jus cogens*, as demonstrated in Chapter III. The first general theme is the use of a treaty, in this case, the VCLT, to establish the initial nature and content of *jus cogens*. This theme concentrates on the relationship between the provisions of the VCLT and the existence of peremptory norms in the international legal system. The next theme is the progression of *jus cogens* from a concept that relied heavily on the VCLT to a purely autonomous one that is at the top of the hierarchy of international law norms. The use of *jus cogens* to overcome a variety of jurisdictional issues through universal jurisdiction is the next theme. The content, scope

⁶ Haas, Winter 1992, 3.

⁷ Haas, 1992, 3. *See also* Haas, Winter 1992.

⁸ Schachter, 1977, 225-226.

and expansion of the specific categories of norms that are peremptory are the final common pattern.

As shown in Chapters IV and V, evidence of the international legal community's ideals and values concerning the peremptory norms of the prohibitions against piracy and slavery are clearly found in the international law curriculum. The first rhetorical theme is the status of these prohibitions as peremptory norms. The treaty basis of these norms is the second rhetorical theme. These prohibitions having universal jurisdiction, thus allowing any state to prosecute violators of these crimes, is another rhetorical theme. The final theme is the obligations and enforcement duties that flow from these norms.

These rhetorical themes, both those relating to *jus cogens* in general and the prohibitions on piracy and slavery, show the ideals and values of the international legal community. This rhetoric is one of the sources of international law under Article 38. It shows the one side of the discontinuity between the teachings of jurists and the custom of states as demonstrated by the actions of state actors.

Reality of State Actions

These rhetorical themes concerning the prohibitions against piracy and slavery are not aligned with the actions of the states. As shown in Chapter IV, pirate attacks are becoming more frequent and more violent.⁹ Given that most piracy statistics come from self-reporting, which has been shown to be consistently underreported by up to seventy-five percent, the large number of piracy incidents throughout the world is noteworthy.¹⁰ These attacks indicate a lack of enforcement by states to prevent both at sea attacks and

⁹ International Maritime Bureau, 2012.

¹⁰ McNicholas, 2008, 172. *See also* International Maritime Bureau, 2012.

to quash safe havens for those committing the attacks. In addition to not providing enforcement of this peremptory norm, when pirates are captured, they are often released and not prosecuted. Some states also collude with individual pirates through government officials, shipping offices, port administrators, and others in power. Piracy is still a problem throughout the world and states are failing in their duties under the mantle of *jus cogens*.

In the same fashion as piracy, the extent of slavery is also hard to pin down. As previously discussed in Chapter V, slavery is an illegal activity that is a low priority for law enforcement, thus accurate data is hard to capture.¹¹ Slavery estimates have placed the number of individuals throughout the world to be 18 out of every 1000 individuals or up to as many as 29 million individuals.¹² The abundance of slaves existing in the world today indicates that slavery remains a significant problem. Government collusion is also a problem because of the role of governmental corruption in facilitating the success of human trafficking operations.¹³ Slavery is similar to piracy in that states are not fulfilling their responsibilities under international law.

The reality of piracy and slavery indicates that not only do states not prosecute for these crimes, thus violating the obligations and duties born out of the nature of peremptory norms, but they actively collude with pirates and human traffickers. This reality shows the actions of state actors, or the general practice of states, a source under Article 38. It shows the opposite side of the discontinuity between the two sources of international law or the gap between rhetoric and reality.

¹¹ Cole, 2006, 799. *See also* Aronowitz, 2009, 15.

¹² United States Department of State, 2011. *See also* Kara, 2009.

¹³ Aronowitz, 2009, 62.

This gap between the rhetoric of the international legal community and the reality of state action raises a significant question within the international legal system. This gap is noticeable by both the actions of the states violating international law, but also by a lack of acknowledgement of these violations by the community of international lawyers. The gap between the rhetoric and reality of peremptory norms is especially instructive because of the special status that *jus cogens* holds in international law. This status of peremptory norms in modern day international law “implies that it outlaws not just conflicting treaties but also any inconsistent legal action or situations.”¹⁴ Since the rhetoric of these norms is so very strong, the reality of enforcement and application should be substantial. The existence of this gap shows that this is not the case. If the strongest and most robust area of the international legal system does not have alignment between the sources of international law as contained within Article 38, what are the implications of this gap?

IMPLICATIONS

A number of implications flow from lack of alignment between the different sources of international law. According to the international legal community, peremptory norms are well-established and properly functioning in the international legal system. The reality, as seen in the actions of states, calls this into question. What are the implications that arise from this disconnect?

Jus cogens serves more than one purpose in the international legal system. It is seen as a basis for the morality of the system and the pinnacle of the hierarchy of norms, thus controlling other lesser norms in international law. It gives rise to state obligations

¹⁴ Orakhelashvili, 2006, 206.

and responsibilities to the international community as a whole and to individuals. These norms also control state behavior by having the ability to override sovereignty.

This study concentrated on the role of *jus cogens* in the international legal system. While the main understandings of this project are limited to the role and function of these particular norms, some general implications can be extrapolated from this project. An understanding of *jus cogens* is necessary to comprehend international law generally, due to the nature of these norms and their prominence in the hierarchy of the international legal system. These general implications, while applying to the entire international legal system, must still be viewed in the context of peremptory norms.

There are also implications for the field of international relations. Since the international legal system is a normative system, the disconnect between the two different sources of peremptory norms implies effects for both examining epistemic communities and normative systems. The following section discusses these implications.

Implications Concentrating on Peremptory Norms

The examination has focused on the role of peremptory norms in the international legal system as a crucial case demonstrating the inconsistency between the sources of international law under Article 38. As a result of this concentration, there are implications from this project that do not and cannot be applied to the international legal system generally. These implications relate specifically to the uniqueness of peremptory norms.

The Content of Jus Cogens

The first implication concerns the current content of *jus cogens*. Since there is an inconsistency between the sources of international law concerning peremptory norms, especially the prohibitions against piracy and slavery, what is the status of these norms? It can be argued that these norms have apparently fallen into a no-man's land. The main group of individuals who have the ability and influence to point out the lack of enforcement, the international legal community, view this law as settled and mature, have thus largely looked the other way. State actors, which is the group that has the ability to enforce these provisions, has an interest in continuing on the current path, due to limited resources and a lack of apparent long-term consequences on the international stage. If these norms are within this no-man's land, then do these norms still fall into the category of *jus cogens*?

The implication is that no norm is strong enough or robust enough in both its tenets and its application to currently fall into category of *jus cogens*. Under this view, a norm has to fulfill all the requirements to be considered peremptory. Considering that the two oldest and most well-established norms, the prohibitions against piracy and slavery, do not fulfill the requirements, the other less well-established norms, such as the prohibition against torture, would probably not meet the *jus cogens*' test.

The Nature of Jus Cogens as a Category of International Law

Given the evidence presented above, *jus cogens* is not the robust and strong set of norms as put forth by the international legal community. If these norms are not fulfilling the requirements of their perceived category, is there an issue with this being a separate

category of international law? Even if this is still viable as a separate category of law, then the true nature of these norms should be recognized.

Jus cogens has a certain well-defined nature. These norms are characterized by a number of features. These features include obligations placed upon states to fulfill the necessary obligations, such as enforcement of the provisions of these norms; the ability to overcome issues of jurisdiction by having universal jurisdiction; the inability of states to derogate from these norms, thus overriding issues of sovereignty and state interest; and, being the top norms in the hierarchy of the international legal system. As seen in the examples of the prohibitions of piracy and slavery, the features the *jus cogens* nature are not being met by states. For instance, states are not fulfilling the necessary obligations that are contained with the nature of peremptory norms. Since these norms are separate from other norms found within the international legal system because of their nature, and this nature is not being fulfilled, this category of norms may be considered to be an illegitimate separation from other norms in international law.

Peremptory norms may be considered a separate category of law, but the international legal community needs to recognize that it is currently more aspirational than a reality. The simple naming of the norm as *jus cogens* does not make it a peremptory norm. The international legal community needs to pay more careful attention to these failings and determine steps that may make *jus cogens* more robust in reality.

The Expansion of the Canon of Peremptory Norms

The second implication is that the premature expansion of peremptory norms will both harm the category of peremptory norms by further weakening this canon of norms and will probably not provide the benefit being sought by adding to this category. As

Koskenniemi stated, “[t]he wider the laws grasp, the weaker its normative forces.”¹⁵

Peremptory norms lose their fundamental nature due to the expansion of the category, thus threatening their purpose in international law.

Due to the potency of peremptory norms, it is seen by some as “even more difficult to prove and establish than is a usually controversial rule in customary international law.”¹⁶ Despite the increased difficulty in establishing new *jus cogens* principles, this does not prevent international actors from trying to expand the scope of *jus cogens*. This leads to the concept of peremptory norms being watered down. The more norms that are pushed into the category of *jus cogens*, the less strength this category possess. This temptation to expand also might weaken the individual norm being pushed into this category since *jus cogens* is weaker than the international legal community has presumed.

This push for expansion has been occurring “since the adoption of the Vienna Convention” as can be seen in how “literature has abounded in claims that additional international norms constitute *jus cogens*.”¹⁷ One of the most commonly considered norms to include in the expanded category is the prohibition of torture.¹⁸ Other possible peremptory norms include the prohibitions on drug trafficking, hostage taking, and terrorism.¹⁹ While a number of these expanded norms do shock the conscience of mankind, they have not necessarily reached the same level of acceptance of other areas, such as piracy and slavery. Attempts to expand *jus cogens* have been used to further state

¹⁵ Martti Koskenniemi, “The Fate of Public International Law: Between Technique and Politics,” *The Modern Law Review* 70, no. 1 (January 2007), 1-30, 23.

¹⁶ Janis, 2003, 65.

¹⁷ Dinah Shelton, “Normative Hierarchy in International Law,” *The American Journal of International Law* 100, no. 2 (April 2006), 291-323, 303.

¹⁸ Janis and Noyes, 24. See also Malanczuk, 568.

¹⁹ Epps, 197. See also The National Security Strategy of the United States of America, September 17, 2002.

interests by placing the label of peremptory norm on a principle. For example, some states have argued that *jus cogens* should include the “sovereignty of national resources,” thus remote sensing data should not be used and disseminated on a “non-discriminatory basis.”²⁰

In addition to the category of *jus cogens* being expanded to include more specific issues, such as terrorism, pre-existing peremptory norms are also being expanded to include issues that do not fully fall into original definitions. The best example is the peremptory norm concerning piracy. There is a number of individuals who “misuse... the term” because they “want to stamp a particular act with a well-known and attention-getting epithet.”²¹ This is seen when the illegal download of music or other media is labeled as “piracy.” It is being used to invoke certain duties and obligations, even though these duties and obligations should not be applied because there is a lack of comparative importance.

If a norm is found to be peremptory, then it is viewed by the international community of lawyers as having a value added in its invoking of duties, obligations, and universal jurisdiction. However, “[u]nder these circumstances, the value added by labeling norms as peremptory is certainly open to question.”²² In a system that is based upon words, the labels that norms receive matter. When a specific label is applied to a principle that does not fit the category, the special nature of the category is lost for all principles within this category.

²⁰ Damrosch, Henkin, Pugh, Schachter, and Smit, 1561.

²¹ Gottschalk and Flanagan, 29.

²² Shelton, 305.

Implications Concerning the Overall International Legal System

The identified gap between the rhetoric and reality of peremptory norms implies that there are several issues that affect the international legal system. These are the logical conclusions based in the role of *jus cogens* in the international legal system.

The Moral Basis of the International Legal System

As discussed Chapter II, *jus cogens* could be considered to be a basis of morality in the international legal system because of the fundamental subjects that are peremptory norms. These norms are considered to be “already working as a host of ‘world public order’ standards.”²³ These peremptory norms can also be seen as the morality of the international legal system because it “appears here less as this rule or that institution than as a placeholder for the vocabularies of justice and goodness, solidarity, responsibility and faith.”²⁴ This can easily be seen in subject matters that fall into the category of *jus cogens*, such as the prohibitions against slavery and genocide. Peremptory norms are the basis of the normative system of international law that “provides direction for international relations by identifying the substantive values and goals to be pursued.”²⁵ Given that the effectiveness of *jus cogens* has been called into question by the gap between the rhetoric and reality of these norms, the morality of the international legal system may also be an issue.

Some authors claim that there is a “clear distinction between substantive rules of law and rules of morality, no matter how much the latter might be thought desirable or

²³ Cassese, 2001, 148.

²⁴ Koskenniemi, 2007, 30.

necessary.”²⁶ This statement is true in some cases, such as the prevention of the depletion of natural resources. Many individuals would see the protection of natural resources as rule of morality, but it is treated as a substantive rule under the current international law system. While this might be the case with certain lower level norms, *jus cogens* is a special category of principles, whose purpose is to provide moral guidance to the international legal system. This moral basis is called into question due to the gap between the rhetoric and reality of these norms.

The Stability and Strength of the International Legal System

International law is important because it provides stability in the international system. When the two of highest norms of the international legal system are suffering from a discontinuity in its sources, this weakens the foundations of the international legal system. Hannikainen argues that “[t]he absence of peremptory norms would constitute at least a potential threat to the international legal order.”²⁷ Since these norms are not functioning at the expected level, the implication exists that other areas of the international legal system are not functioning properly either. As stated by Louis Henkin, “[l]aw keeps international society running, contributes to order and stability, and provides a basis and a framework for common enterprise and mutual intercourse.”²⁸ Since stability and strength in the international community flows from international law, the

²⁵ Charlotte Ku and Paul F. Diehl, “International Law as Operating and Normative Systems: An Overview,” in Charlotte Ku and Paul F. Diehl (eds.) *International Law: Classic and Contemporary Readings*, (Boulder, CO: Lynne Rienner Publishers, 1998), 1-16, 7.

²⁶ Dixon, 342.

²⁷ Hannikainen, 726.

²⁸ Louis Henkin, “The Politics of Law-Making,” in Charlotte Ku and Paul F. Diehl (eds.) *International Law: Classic and Contemporary Readings*, (Boulder, CO: Lynne Rienner Publishers, 1998) 17-24, 18.

failure of states to rise up to the obligations provided for by peremptory norms counteracts this strength.

For this stability to be maintained, both system rules, such as *pacta sunt servanda*, and normative rules, such as the right to passage on the open seas, need to be enforced by states. The gap between the rhetoric and reality of *jus cogens*, especially the lack of states enforcing their obligations, calls into question the enforcement of other norms. Since the international legal system is a self-enforcing system, this can be seen as a possible weakening of the strength and stability of the international legal system.

Concepts in the International Legal System Related to Jus Cogens

A number of other concepts in the international legal system are related to peremptory norms. Since peremptory norms are at the top of the international law hierarchy, if these norms are demonstrated to be a mirage, then other international norms can also be brought into question. These norms can be well-established, such as sovereignty, or they can be lesser norms, such as agreements relating to fishing stocks. The international legal community perpetuates the belief that *jus cogens* is an effective, but, as this project has demonstrated, this belief is misplaced.

Two norms of international law considered to be of a relative higher level that might be implicated by the consequences of the gap between the rhetoric and reality of *jus cogens* are *pacta sunt servanda* and sovereignty. Peremptory norms have the ability to supersede both *pacta sunt servanda* and sovereignty by voiding treaties that violate *jus cogens*. If a state agrees to a treaty that violates a peremptory norm, the principle of *pacta sunt servanda*, which basically means that agreements must be kept, will be overridden. Sovereignty can also be dominated by *jus cogens* because it prevents the

unfettered actions of states to make any agreement that they deem necessary or to act strictly in their own best interests if it involves a situation of peremptory norms.

Orakhelashvili stated that “[t]he purpose of *jus cogens* is to safeguard the predominant and overriding interests of the international community as a whole as distinct from the interests of individual states.”²⁹

If peremptory norms are not properly functioning, as demonstrated by the examples of the prohibitions against piracy and slavery, then their other functions, such as providing limits on state behavior are also uncertain. If these higher ranking norms do not have the limitations of *jus cogens* upon them, the violations can continue, which provides a further glitch in the functioning of the international legal system as it is viewed by the epistemic community of international lawyers.

Lesser norms are also affected by the questionable effectiveness and strength of *jus cogens*. Given that the gap indicates issues with the strongest and most robust principles in international law, the enforcement of lesser principles can naturally be called into question. When the fundamental norms that are intended to prevent piracy and slavery are not being upheld by state actors, it stands to reason that lesser norms will also be ignored by these actors, since the basis of the lesser norms is not as deep-seated in the international legal system. Rules that are formed merely on negotiated treaties or only have a basis in general customary law do not have as strong of a base as *jus cogens*. However, the core tenets of the peremptory norms canon, which have their basis in history, treaty law and the teachings of the epistemic community, are not being adequately enforced in the international legal system. This failure of enforcement casts doubt upon the enforcement of these lesser rules.

²⁹ Orakhelashvili, 2006, 46.

The Purpose of the International Legal System

The role of international law “plays in world affairs – political, economic, social, and humanitarian – has never been greater.”³⁰ Despite this increased role, the purpose of the international legal system is being subverted by the lack of effectiveness of peremptory norms. The system has “aims of...specific prevention, maintain public confidence in the legal system, the settlement of conflicts, and demonstrating solidarity with the victims.”³¹ The international legal system is meant to provide proscription and prediction of behavior. If states are not living up to their responsibilities concerning the strongest and most robust norms, what about lesser norms in the international system? Put another way, how can the international legal system be relied upon predictive or proscriptive information if the norms that are at the top of the hierarchy are not being supported by international actors?

The gap between rhetoric and reality of peremptory norms affects the predictability of the international legal system. When the most fundamental norms of a system are not effective as intended, the ability for other norms of the system to be effective in a predictable manner is dubious. The international legal system is meant to provide a framework for behavior of international actors and individuals. However, when the most fundamental norms of this system are not being implemented, the behavior of international actors and individuals cannot necessarily be predicted.

The proscriptive nature of the international legal system is also called into question by the existence of the gap between rhetoric and reality of *jus cogens*.

³⁰ Janis, 2003, 8.

International actors have a duty to protect the interests of “the whole world community,” especially when “protecting such fundamental values as peace, human rights, or self-determination of people.”³² While it can be argued that “there is no particular merit inherent in complete compliance with the law,” the law does have to have enough “compliance to enable civilized social life to proceed” and “to satisfy the basic demands of justice.”³³ In other words, if *jus cogens* is not being enforced to meet the basic demands of justice, then the proscriptive nature of the international legal system is not being satisfied.

If the top of the hierarchy of international law is not being enforced, states may not be motivated to enforce lesser norms. The lack of enforcement could negatively affect the predictive and proscriptive nature of the international law system because there would be a deficiency of purpose of the system to indicate future behavior of international actors and individuals.

Implications for International Relations Theory

The epistemic community of international lawyers have a constructed world view. This view is seen in the rhetoric contained in international legal textbooks as demonstrated in Chapter III. The epistemic community literature would expect the international legal community to exercise power over agendas, policies, and the general field. The gap between the rhetoric and reality of peremptory norms concerning the prohibitions of piracy and slavery shows that it is not as powerful. This lack of power is

³¹ Peer Stolle and Tobins Singelstein, “On Aims and Actual Consequences of International Prosecution of Human Rights Crimes,” in Wolfgang Kalreck, Michael Ratner, Tobins Singelstein and Peter Weiss (eds.), *International Prosecution of Human Rights Crimes*, (New York: Springer, 2007), 37-54, 47.

³² Cassese, 2005, 262.

³³ Lowe, 33.

seen in the disconnect between the actions of states and the rhetoric perpetuated by the epistemic community.

Amongst many international relations scholars, the international legal system is viewed as a paragon of normative systems. It is a normative structure that is believed to significantly influence state behavior as discussed in Chapters I and III. The case of the core concepts of *jus cogens*, the prohibitions of piracy and slavery, are considered the strongest and most robust, but the influence of international law on the actions of states is surprisingly weak. This indicates that the mere existence of norms or a normative system does not necessarily have the extensive power to modify behavior of state actors.

Both of these observations call into question the usefulness of relying on normative analysis to explain state behavior. While the value of studying normative aspects of international relations is not completely discounted, caution should be applied so international relations theorists do not follow the international legal community down the rabbit hole of assuming the power of normative systems.

CONCLUSION

An understanding of the international legal system, in particular, *jus cogens*, is demonstrated throughout this study. The following discusses the implications of this understanding. By looking at the international legal system using crucial case methodology through the lens of the international legal community, insights that are not prevalent in the current literature are found. To determine these insights, this project has looked at the inconsistency between the sources identified in Article 38 concerning peremptory norms, specifically the prohibitions against piracy and slavery. These two norms were chosen because of their well-established history as both part of international

law, and in particular, as *jus cogens*. The inconsistency of international law sources is demonstrated by the gap between the rhetoric and the reality of these *jus cogens* norms.

This chapter highlights the implications of this gap. These implications relate both to *jus cogens* and to the broader international legal system as it relates to peremptory norms. The borders of the category of peremptory norms are not as well-defined as indicated by the rhetoric because the content is uncertain in reality. The nature of this category of norms is questionable because of the lack of robustness in reality of *jus cogens*. The rhetoric of the international legal community is also attempting to expand this category which diminishes the norms that already are categorized as peremptory and does not provide the support being sought by designating a norm as *jus cogens*.

Implications are also evident in the broader international legal system. The disconnect between the rhetoric and reality of peremptory norms has far reaching implications. Since peremptory norms are considered to be the morality of the international legal system, their lack of success calls this base into question. The stability and strength of the system could be considered undermined since the strongest norms are not fulfilling their rhetorical promises. Another implication involves related legal concepts. When peremptory norms are not being upheld, there may be a lack incentive to uphold lesser norms that do not have established and extensive foundation. The purpose of the international legal system is to proscribe and predict the behavior of those within the system. This purpose is undermined when those norms that are peremptory in nature are not being realized.

Implications for the field of international relations are also shown by the gap between the sources of peremptory norms. This project has shown that care must be

given to the use of normative systems when examining state behavior. The mere existence of norms, even those norms often considered the strongest and most robust, as in this case, does not necessarily impact state behavior.

Overall, these implications show that the rhetoric/reality gap is both significant to understanding the normative system of international law and to highlight the importance of taking care when following the viewpoint of an epistemic community.

CHAPTER VII

CONCLUSIONS, POLICY ISSUES, AND FUTURE RESEARCH

This study examined the crucial case of peremptory norms in the international legal system, in particular, the core tenets prohibiting piracy and slavery. The discontinuity between the Article 38 sources concerning peremptory norms highlights an inconsistency between the epistemic community of lawyers and state actors. The international legal community's ideals and values result in rhetorical support for peremptory norms as being the strongest and most robust norms in the international legal system. The actions of states concerning these norms are significantly different, thus creating a gap between these sources. This analysis results in a number of final general conclusions, a variety of possible policy issues and areas of future research to further the understanding of this area of international legal inquiry.

GENERAL CONCLUSIONS

The foregoing examination has provided reliable evidence that the norms considered to be the strongest and most robust are surprisingly not that strong or that robust. The inconsistency between the Article 38 sources of international law as manifested as the gap between the rhetoric and the reality of peremptory norms demonstrates that *jus cogens* is not the robust and more of an empty shirt. This state of peremptory norms creates a number of implications for these norms and the general international law system as it relates to these norms.

The international legal community seems to be out of touch with the real-world status of the prohibitions against piracy and slavery. The lack of acknowledgement

concerning the pervasiveness of piracy and slavery around the world is seen in the international legal community's view of these prohibitions as settled law. While some members of the this community tip their hat to possible issues of enforcement, the concentration in the written record, international legal textbooks, still refers to these issues as settled with a clear expectation that prosecution barriers, such as jurisdiction, have been removed.

International law appears to rest between the body of case materials and the actual rules of the international legal system. International law is a different system than domestic law. It is important for supporters of international law to not oversell the international legal system. The international system does not have a separate enforcement arm of government. It is a self-enforcing system where enforcement can be overridden by the interests of states. This is not to say that international law is unimportant, it is merely to emphasize the need to be cautious when discussing the power of the international legal system.

POLICY ISSUES ARISING FROM THE RHETORIC/REALITY GAP

International law has the potential to be a strong tool to combat the scourge of problems, such as piracy and slavery, but how can this be accomplished? Below a number of policy concerns are identified that address the problem of closing the gap between the rhetoric and the reality of *jus cogens*.

The policy questions that arise from this gap begin with the attempt to align the sources of international law. The occurrence of this shift would have to be accompanied by a greater understanding of *jus cogens* and not a mere acceptance that views its existence as enough to create the necessary reality. The next policy question goes to the

heart of the most recent shift in *jus cogens* theory and rhetoric. The shift is seen in the continuous increase in attempts to expand the boundaries of *jus cogens*. By expanding the boundaries of *jus cogens* this concept is both weakened, in general, as aspects that are included do not necessarily fit the level of peremptory norms and weakened by the growing gap between rhetoric and reality in the international arena. This expansion problem also is an issue from the other direction. If *jus cogens* is not an effective principle in international law, by pushing other issues into this mold, the usefulness of the prohibitions and guiding tenets may also be diminished. The third policy question relates to the international legal community and the teaching of the future generations. The only way to have successful change is to interrupt the continuity of rhetoric that permeates the current international legal curriculum. The final policy question involves the financial issues surrounding the enforcement of the prohibitions of piracy and slavery.

Better Alignment Between the Sources of International Law

To enforce the laws that fall into the category of peremptory norms, a better alignment is needed for the Article 38 sources. If this occurs, then the inconsistencies that call into question the nature of *jus cogens* and its core tenets will no longer exist. In the realm of policy, the alignment should occur from a shift in the states' inability or lack of enforcement of these norms.

States failed to rise to the obligations and responsibilities of peremptory norms. This failure has manifested into a failure of international law. The law needs to find a way to be relevant again. The best method for this to occur is for states to start fulfilling their obligations under these universal norms. Not only will that protect the victims of

these heinous crimes, but it will align the pinnacle of the international legal system. In order for this to occur, the international legal community must recognize this gap.

Jus Cogens Expansion

The arguments for including more subject in the canon of *jus cogens* is based upon a misconception that norms in this category are enforced by the international community and that the rhetoric of these norms imparts increased authority into the subject matter. While the temptation to include a variety of issues in this category of norms can be overwhelming, it should be resisted. The efforts to make more norms *jus cogens* will only further weaken the category of peremptory norms. It is not an effective method of ensuring enforcement. If all norms are eventually considered peremptory, then the purpose of providing a separate category is negated, thus abolishing the category of *jus cogens*. This desire to force norms into the category of *jus cogens* underscores power of labels and words. A good example of this is the expanding use of the word “piracy” to describe copyright violations of music, movies, or software.

Arguments for expanding the category of *jus cogens*, such as forcing enforcement obligations upon states, might be used to be twisted around if these laws are important and should be observed. Other areas of international law have been more successfully enforced than peremptory norms, and these laws may serve as a model for future actions in the areas traditionally reserved to *jus cogens*.

The International Legal Community and Teaching

The education of future generations of the international legal community relies on a standardized teaching method and a coherent and consistent pedagogical approach.

This method is based upon the precedent of past generations and established case law and materials. The international community of lawyers perpetuate the continued flawed functioning of the system through teaching new generations that peremptory norms are settled law that has developed from both treaty law and customary law. These lawyers rarely address the practical application of *jus cogens*, thus continuing the viewpoint that these are not issues that need to be addressed in legal instruction. In other words, the international community of lawyers typically does not examine the lack of functionality of these norms, they simply espouse their existence in international law. This lack of acceptance of reality demonstrates that the international community of lawyers appears to be operating under different assumptions than state actors.

To change the epistemic community, the teaching methods and the overriding ideals and values need to be reexamined and changed to encompass the lack of practical effectiveness of the rhetoric of this community. This policy shift in the international legal community's method of knowledge transfer to subsequent generations of international law practitioners will increase the general understanding of the international legal system and should lead to possible solutions.

Financial Policy Issues Concerning Piracy and Slavery

Economics will probably determine a change, if any, in state behavior toward the prohibitions against piracy and slavery. Those participating in these illegal activities will continue to commit these crimes as long as it is economically feasible and the benefits outweigh the costs.¹

¹ Aronowitz, 63.

The enforcement of the prohibitions against piracy and slavery are expensive propositions in terms of both financial resources and political capital. It takes away limited military or law enforcement resources, if they are not participating in the illegal activity. In addition to the cost of the catching the pirates, “overseeing prosecutions is costly and logistically challenging.”² Slavery investigations are costly and complicated that draw funding away from other opportunities.

Local populaces also benefit from piracy and slavery. Beyond pirates and traffickers, the economic benefits are observable. A variety of business, such as “farms, factories, restaurants, and other legitimate businesses,” benefit from the money being spent by those participating in these illegal activities.³ Populations even benefit from the services of slaves being provided to take care of their wants and need and thus argue against a change in the status quo.

The lack of enforcement of these prohibitions also has a cost. For example, in the case of piracy, the costs can be measure in both economic costs and human costs. Piracy increases the cost of commerce. When cargoes are stolen or delayed, there is a resulting cost. It can also raise the cost of shipping goods due to the increase of the cost of insurance, security measures, and shipping route changes. The cost of insurance has significantly increased as underwriters change how policies are written to reflect war-risk

² Elizabeth Anderson, Benjamin Brockman-Hawe, and Patricia Goog, *Suppressing Maritime Piracy: Exploring the Options in International Law*, American Society of International Law, Academic Council on the United Nations System and One Earth Future Foundation, Workshop Report from October 16-17, 2009, 8 found at <http://www.asil.org/files/suppressing-maritime-piracy.pdf>.

³ Aronowitz, 63.

levels and additional premiums for high-risk shipping routes.⁴ Piracy, even if under reported, cost at least \$60m-70m in 2008 just in relation to Somali.⁵

Piracy can also create international security problems. The human toll goes beyond the cost of human lives to the individual seafarer. A decrease in safety and security of high seas and shipping corridors can occur when pirates take over vessels. They may not be properly trained to maneuver the ships, especially in chokepoint areas, which could lead to a grounding or other environmental threat, such as a fuel spill. There is a loss of control of weapons and munitions to pirates, who are by definition using them for violent activity, thus decreasing security. Since military resources are finite, using these resources to combat piracy decreases their availability for other missions. Just to successfully protect the merchant vessels sailing only near the Horn of Africa, an increase of at least forty ships to the recent twenty in the international antipiracy task force would be needed.⁶

Hopefully there will be a tipping point, when the lack of enforcement of these peremptory norms is more costly to states than the current lax of enforcement. This tipping point could be measured in not only a cost-benefit determination based simply on straight balance sheets, but could also account for broader costs. These broader costs could include the erosion of international law and the stability of the international legal system or the human toll that cannot necessarily be reduced to simple dollars and cents. If these broader costs are included in a more inclusive accounting, states might see the

⁴ Zack Phillips, "Marine Insurers Transfer Piracy Risks to War Cover," *Business Insurance*, March 30, 2009.

⁵ *BBC News*, "Q&A: Somali Piracy," January 1, 2009.

⁶ Mark Hosenball, "The Danger of Escalation," *Newsweek*, April 29, 2009, 6.

importance of committing financial resources to battling piracy and slavery more aggressively.

Possible Long-Term Consequences

There are two legal shifts being proposed by the international legal community and other international actors, which could have long-term consequences if the legal theories being perpetuated come to fruition. These theories argue for enhanced action on the part of the state to allow for more prosecutions by increasing state responsibility and decreasing immunity protections from prosecution.

While this project has shown that the strength and robustness of peremptory norms does not guarantee the actions of states, these norms have given rise to calls for higher levels of responsibility by the international community of states as a whole. There has been a movement since the World Summit in 2005, which provides for a “formalized notion that when a state proves unable or unwilling to protect its people, and crimes against humanity are perpetrated, the international community has an obligation to intervene – if necessary, and as a last resort, with military force.”⁷ While this duty has not yet been fully tested, the concept, known as “responsibility to protect” or R2P, calls for an increase in the acceptance of duties and responsibilities that the international community is being charged with in the case of peremptory norms, specifically crimes against humanity.

It has been argued that the violation of a *jus cogens* norm provides the ability to overcome the immunity provided to heads of state under the guise of universal jurisdiction, but this has been a minority viewpoint in relation to cases that have been

pursued, such as *Pinochet*.⁸ Nevertheless, some authors concentrate on how “a state,” not an individual head of state, “waives its right to sovereign immunity when it transgresses a *jus cogens* norm” by discussing the *Hugo Princz v. Federal Republic of Germany*.⁹

These possible shifts in legal theory will probably still suffer from the same issues as the current enforcement regimes. However, this does show that there may be hope for the future.

FUTURE RESEARCH

There are four areas of future research that could develop from this study and move it in different directions and toward new horizons. These areas emerge from the parameters of this project. Other questions and issues arise from the determinations of this examination, but were not included to the scope of the current study.

The first area of future research is to examine an historical cross-culture survey of concept similar to peremptory norms in non-Western traditions. While this project examined only the use of Western concepts due to the current concentration in the international legal system, it is by no means the only worldwide legal tradition. This type of cross-cultural analysis may provide insight into the possible solutions for the current international system.

The interaction between the increased level of globalization and grass-roots movement on the rhetoric of the international legal system is another area of future research. The increase of grass roots movements through the use of modern tools, such as social networking, and more traditional methods, such as non-governmental

⁷ Roger Cohen, “A Change to Believe In,” *The New York Times*, February 21, 2008.

⁸ Dixon, McCorquodale, and Williams, 2010, 334.

organizations, may influence the dialogue of the community of international lawyers or the actions of states. These outside factors may have an influence upon the rhetoric of the epistemic community or even upon the ideals and values of the community members. Actions of states may also be influenced by the increase in the access to information by individuals.

A third area is to determine if a general increase in enforcement or if a different legal regime would influence the actions of states. This would require a different method of analyzing the information provided in both this project and possible world changes, but it could provide insight into what is needed to change the current international legal system to effectively enforce the rights of individuals around the world.

The final area of future research that arises from this project is to look at the punishment aspects of these international crimes. Very few prosecutions of international crimes occur as seen throughout this project, but an examination of the punishments given to violators will provide further insight into the international legal system. These are extraordinary violations of international law. Are the current punishments also extraordinary? Should these punishments be extraordinary? The behavior of the future criminal does not appear to be deterred, would stricter punishments, even with fewer prosecutions, be enough to deter the behavior of international criminals.

CONCLUSION

The foregoing study provided insight into how peremptory norms in the international legal system are affected by the disconnect between the international community of lawyers and international actors. There are both policy issues and

⁹ Reisman, Arsanjani, Wiesner, and Westerman, 536-537.

implications that flow from this inconsistency in the sources of international law under Article 38. By showing the effects of the gap between rhetoric and reality of *jus cogens*, new understandings into this area of literature have been discovered.

The issues that have risen from this project will continue to be problematic unless there are changes. This will create long-term consequences to the international legal system. This will be increasingly highlighted as globalization increases and the action of one international actor greatly influences and affects a larger portion of the world's population, not even necessarily the citizens of that state. Overall, this is one area of international law that cannot be ignored for the sake of both the victims of these international crimes and all members of the world.

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APPENDIX

The textbooks were selected based upon popularity on internet book purchasing sites. This method was used to incorporate both the first-hand market and the second-hand market popularity for international legal textbooks. The top book purchasing sites were found by doing a Google search with the keywords “law textbooks bookstore.”

First, a search for the top eleven sites for book purchasing based on a Google search for keywords “law textbooks” was conducted. The following sites were used to determine the textbooks that will be used to demonstrate the rhetoric of the international legal system concerning *jus cogens*:

- www.amazon.com
- www.barnesandnoble.com
- www.campusbooks.com
- www.cheapesttextbooks.com
- www.lawbooks.com;
- www.ecampus.com
- www.lawbooksforless.com;
- www.textbooks.com
- www.thelawbookstore.com
- www.directtextbook.com
- www.half.com

Second, the individual textbooks that appeared on at least four sites and concentrated on either “general international law” or “public international law” as the subject-matter were chosen to form a list of the top textbooks. The following list provides the top textbooks should supply sufficient evidence of the rhetoric of the epistemic community of lawyers and the number of websites that they are found upon.

The following is an alphabetical list of the textbooks used for this project:

- Akehurst’s Modern Introduction to International Law, Peter Malanczuk, 1997 (6)
- An Introduction to International Law, Mark Janis, 2003 (7)

- Cases and Materials on International Law, Martin Dixon and Robert McCorquodale, 2003 (4)
- Emanuel Law Outlines: International Law, Linda Malone, 2008 (7)
- Fundamental Perspectives on International Law, William Slomanson, 2006 (4)
- Handbook of International Law, Anthony Aust, 2005 (4)
- International Law, Mark Janis, 2008 (6)
- International Law, Antonio Cassese, 2005 (6)
- International Law, Malcolm N. Shaw, 2003 (5)
- International Law, Vaughan Lowe, 2007 (5)
- International Law, Barry Carter, Phillip Trimble and Allen Weiner, 2003 (7)
- International Law, Malcolm D. Evans, 2003 (4)
- International Law, Valerie Epps, 2003 (4)
- International Law and International Relations, David Armstrong, Theo Farrell, and Helene Lambert, 2007 (6)
- International Law and International Relations, Beth A. Simmons and Richard H. Steinberg, 2006 (8)
- International Law Frameworks, David J. Bederman, 2006 (6)
- International Law in Contemporary Perspective, Mahnoush Arsanjani, Seigfried Wiessner, Gayle Westerman and W. Michael Reisman, 2004 (5)
- International Law in the 21st Century: Rules for Global Governance, Christopher C. Joyner, 2005 (5)
- International Law in World Politics: An Introduction, Shirley V. Scott, 2004 (5)
- International Law, Norms, Actors, Process: A Problem-Oriented Approach, Jeffrey Dunoff, Steven Ratner, and David Wippman, 2006 (8)
- International Law: Cases and Commentary, Mark Janis and John Noyes, 2006 (8)
- International Law: Cases and Materials, Lori Fisler Damrosch, Louis Henkin, Richard Crawford Pugh, Oscar Schachter, and Hans Smit, 2001 (7)
- Law Among Nations: An Introduction to Public International Law, Gerhard von Glahn and James Larry Taulbee, 2006 (6)
- Principles of International Law, Sean D. Murphy, 2006 (10)
- Principles of Public International Law, Ian Brownlie, 2008 (7)
- Public International Law in a Nutshell, Thomas Buerghenthal and Sean D. Murphy, 2006 (11)
- Textbook on International Law, Martin Dixon, 2007 (5)
- Understanding International Law, Stephen C. McCaffrey, 2006 (4)

The year of publication is included and the number of websites that list the textbook is included in the parenthesis after the year.

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EDUCATION

Old Dominion University, Norfolk, Virginia

Doctor of Philosophy, Spring 2013

Tulane University, School of Law, New Orleans, Louisiana

Juris Doctor, Spring 2002

University of Central Missouri, Warrensburg, Missouri

Bachelor of Science, Political Science, Spring 1999

Bachelor of Arts, Economics, Spring 1999

HONORS

Old Dominion University Doctoral Fellowship

University of Central Missouri Regents Scholarship

University of Central Missouri Honors Program Scholarships

Tulane Law School Best Editor, *Journal of American Arbitration*

Pi Sigma Alpha Honor Society

Alpha Phi Sigma Honor Society

Leadership Achievement for Outstanding Service and Commitment

Zeta Tau Alpha Sister of the Year

SELECTED EMPLOYMENT

Comprehensive Civil-Military Legal Overview, North Atlantic Treaty Organization,
Norfolk, Virginia

Legal Knowledge Manager, November 2010 – March 2012

Office of Graduate Studies, Old Dominion University, Norfolk, Virginia

Graduate Assistant, August 2009-May 2010

Center for Regional and Global Study, Old Dominion University, Norfolk, Virginia

Graduate Assistant, August 2003 – May 2006

SELECTED PRESENTATIONS

Old Dominion University 5th Graduate Research Conference: *Conflict and the Environment*

National Social Science Association Annual Conference: *Refugee Policy and Audience Costs: An Examination of the Pacific Solution and Audience Costs in Australia*

International Studies Association – South Conference: *Working Paper: Transnational Criminal Organizations and Legitimacy in the Andean Region*

Missouri Academy of Science: *Working Paper: Examining the Effects of Internal Pressures on the Legislature of Bill Passage*